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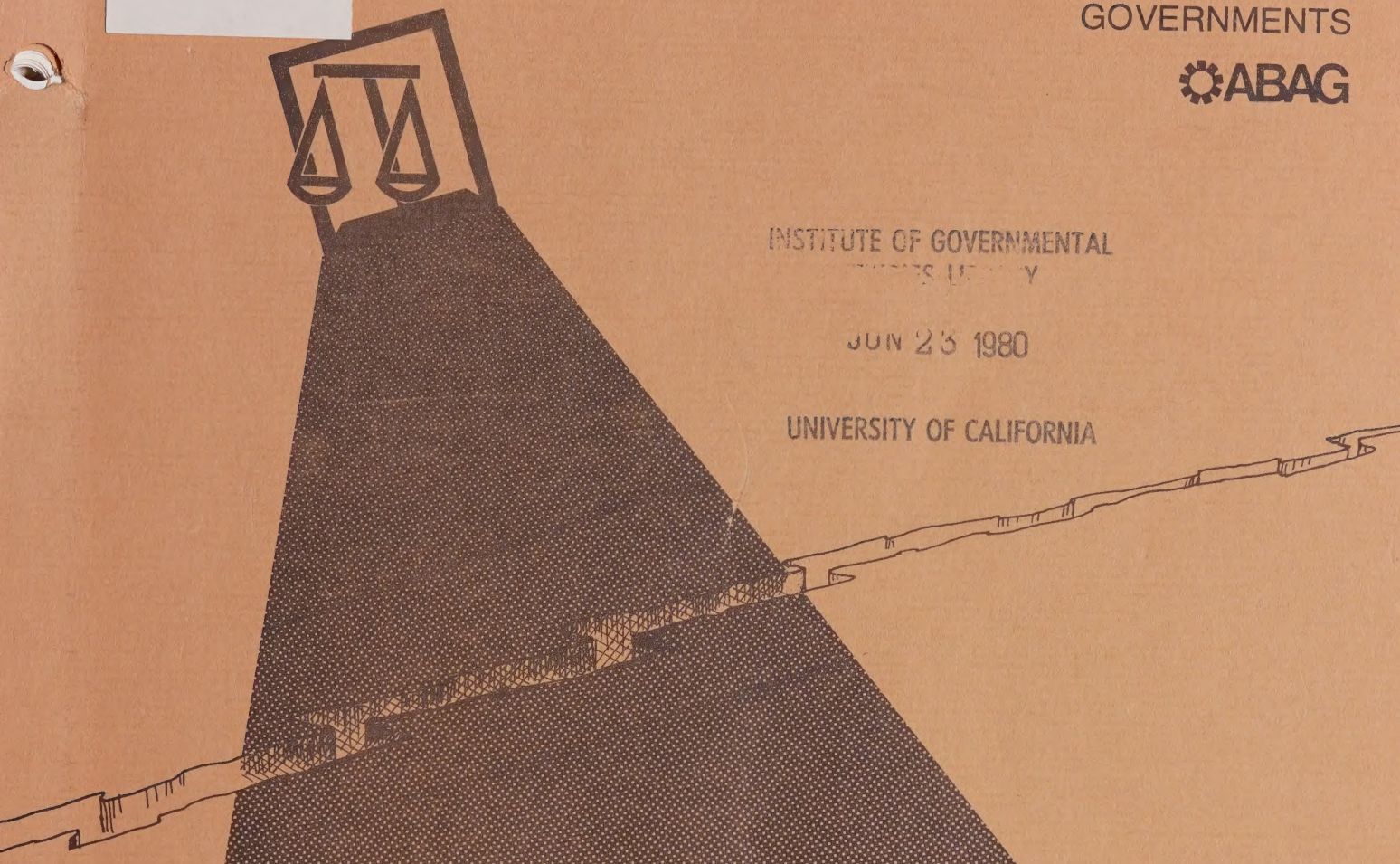

Legal References on EARTHQUAKE HAZARDS AND LOCAL GOVERNMENT LIABILITY

December 1978

SUMMARY OF CONTENTS

REVISED

PART-1

Legal background on tort liability of local governments in the event of an earthquake

Report to Association of Bay Area Governments

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TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

TABLE OF CONTENTS
(Continued)

INTRODUCTION

The report below, in line with the recommendations of the Advisory Committee, focuses on the jurisdictions of California, New York, Washington, and the United States, and discusses those features of substantive law which could most obviously support tort claims against public entities in the event of an earthquake. These features include: the rules on "public information" immunity/liability; the liability rules for the failure to enforce building-code-type protective laws relating to private buildings; and the liability rules for the improper design of public buildings and other public facilities. These discussions are preceded by a more general explanation of the basic structure of governmental tort immunity/liability within these jurisdictions, and of the jurisdictions' particular versions of the "discretionary" immunity. Finally, brief attention is given to certain unique features of California law.

The report does not profess to exhaust all the possibilities for tort liability that might arise. These possibilities approach the infinite--or at the very least, they are extremely indefinite. One intriguing example: as Los Angeles public officials are scolded for cloud-seeding activities that might have encouraged the recent torrential rainstorms which in turn were responsible for disastrous mudslides, one becomes aware that public-entity conduct could, in one way or another, precipitate (or at least facilitate) the occurrence of an earthquake. In such a situation, the public entity could be sued for its negligence which "proximately caused" the earthquake in the first place.

I. BASIC STRUCTURE OF THE LAW OF GOVERNMENT IMMUNITY AND LIABILITY

A. Traditional Law.

The original doctrine of governmental immunity resulted from the coalescence of two major legal conceptions, one procedural, the other substantive. The procedural conception was that a sovereign could not be sued in its own courts without its consent; the substantive conception, that the sovereign could do no wrong; i.e., could not be guilty of something like a tort. These ideas seen basically inconsistent with the strong American norm of government under law, and by the turn of the twentieth century the rule of complete immunity had been significantly modified, at least in its application to municipal corporations (i.e., cities). Under that modified municipal rule--one which prevailed almost everywhere during the first half of the twentieth century--a basic distinction was recognized between a city's "governmental functions" on the one hand and its "proprietary functions" on the other. If a tort was committed in the pursuit of a governmental function, the city was entirely immune; if, however, the tort occurred in the course of a "proprietary function," the city would be as liable as any private party. Public utilities were, for example, commonly regarded as "proprietary;" thus any tort committed by the public utility was legally actionable. Law enforcement and public hospitals, however, were deemed inherently governmental; therefore the full variety of law-enforcement torts and public-hospital malpractice torts were subject to the immunity role. Thus, under the traditional doctrine in its full force, if a pedestrian were run down by a car owned by a public utility, he could sue the city; if the car, however, was negligently operated by a policeman, an immunity would block the lawsuit. If a janitor negligently failed to remove a banana peel from the floor of a public utility's office, liability would be recognized; if, however, the slip-and-fall occurred on a courtroom floor, immunity would prevail.

This pattern of results seems bizarre. And indeed, a number of states, including California, even while continuing to endorse the traditional rule, passed specific statutes to eliminate some of its most glaring anomalies. In California, for example, a 1929 statute made cities liable (rather than immune) for the negligent operation of motor vehicles; and another statute imposed liability for public property in a dangerous condition, without regard to which agency of government happened to occupy the property. Of course, the larger the number of such specific statutes, the less coherent the fabric of the traditional doctrine itself. It should also be noted that while the traditional rule subjected cities to considerable liability, in many jurisdictions, including California, all of the functions of the state were deemed intrinsically governmental. And since a county was regarded as a kind of local branch office of the state, all of its activities were also deemed automatically governmental. Thus the state and all counties could assert a comprehensive immunity.

B. Contemporary Law.

The traditional rule is still adhered to in perhaps a dozen states. See Harley & Wasinger, Governmental Immunity: Despotic Mantle or Creature of Necessity?, 16 Washburn L.J. 12, 33 (1976). However, all the jurisdictions selected by that present study have abandoned that rule. The situations in those jurisdictions are described below.

1. California.

California law fit the traditional mold until 1961. Then, in its decision in Muskopf v. Corning Hospital Dist. (55 Cal. 2d 211, 359 P. 2d 457, 11 Cal. Rptr. 89), the California Supreme Court professed to "abrogate" the doctrine of governmental immunity. According to the Court, the doctrine is "an anachronism without rational basis,...riddled with exceptions, both legislative and judicial...." The Legislature reacted to Muskopf by passing the Moratorium Act of 1961, reinstating the pre-Muskopf rules for a two-year period, during which the Legislature undertook to study the entire problem of governmental immunity. At the behest of the Law Revision Commission, Professor Arvo Van Alstyne prepared a compendious review of California law. The Law Revision Commission, after considering the Van Alstyne report, recommended a comprehensive statute to the Legislature. The Legislature proceded to enact a complex, sophisticated statute, one which accepted most (but not all) of the Commission's recommendations. This statute is commonly (if unofficially) referred to as the California's Tort Claims Act of 1963.

The structure of that Act can be described as follows. It begins with a rule of immunity: governments are immune unless liability is provided for in the Act (Government Code § 815(a)). But having established this immunity rule, the Act then goes on to impose a general rule of liability. Public employees are liable in the same circumstances as ordinary people would be (§ 820), and the public entity is subject to the same rule of vicarious liability for the torts of its employees as a private employer would be (§ 815.2). In addition to this vicarious liability, the Act also subjects the public entity to certain instances of "direct" liability. One instance of "direct" liability involves the "mandatory duty" clause. Under § 815.6, a public entity is liable when it fails to discharge a "mandatory duty" imposed by "an enactment," when the plaintiff's injury is of the kind which the enactment is seeking to avert, and when the public entity is unable to show that it exercised reasonable diligence in its effort to discharge the duty. (The mandatory duty clause is discussed below.) Another instance of public-entity direct liability concerns public property in a dangerous condition; this liability is defined by a number of statutory sections, which are likewise discussed below.

While the Act thus provides for very substantial liability, it counters this by also establishing significant areas of immunity. There is, most importantly, a general or residual rule of immunity for "discretionary" acts (§ 820.2). Under pre-Muskopf law, the rule relating to the torts of public officers (as opposed to that of the public entity itself) was that immunity existed only for "discretionary" acts; what the Tort Claims Act thus accomplished was an application of the pre-1961 rules on public-officer immunity to the subject of public-entity immunity as well. In addition to this general immunity for "discretionary" acts, the Act also contains a number of specific immunities, including, for example, § 818.2, conferring an immunity on public entities for all injuries caused by allegedly negligent inspections.

2. The United States.

The Federal Government's tort liability (and immunity) are derived from the Federal Tort Claims Act, passed in 1946. 28 U.S.C. § 1346 imposes liability on the federal government for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." This section establishes a general rule of vicarious liability; a later section (28 U.S.C. § 2674) can be read as establishing the direct liability of the federal government "in the same manner and to the same extent as a private individual under like circumstances...."

But if the Act provides for substantial liability, it also stipulates significant immunities, mainly in § 2680. Under § 2680(a), immunity pertains whenever the tort claim is "based on the failure or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." Section 2680(h) provides immunity for a significant number of intentional torts, including battery, false arrest, liability, and misrepresentation. A 1974 amendment lifts these immunities insofar as the torts are committed by federal "law enforcement officers." (This amendment was provoked by the unwarranted--and well-publicized--nighttime forays into private homes conducted by certain federal narcotics officials in 1973.)

3. Washington.

Washington is a state whose legal rules were cut from the traditional cloth until 1961. In that year, however, the Washington legislature enacted a statute consenting to the maintenance of tort suits against the state--thus disposing of the procedural basis for immunity. (See generally Bohrnsen & Ryan, Tort Law in

Washington: A Legal Chameleon, 11 Gonz. L. Rev. 73 (1975)). This statute was followed by another statute in 1963, making clear that the state is substantially liable in those tort suits which the 1961 Act procedurally authorized. In 1964, the Washington Supreme Court in Kelso v. City of Tacoma (63 Wash. 2d 913, 390 P. 2d 2 (1964)) ruled that this liability extended as well to political subdivisions within the state. This result was confirmed by legislation in 1967, expressly abolishing the immunity doctrine for the state's public subdivisions.

The Washington statutes are strikingly spare. Section 4.92.090 simply says that "the State of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation." Section 4.96.010 merely states that "all political subdivisions, municipal corporations, and quasi-municipal corporations of the state, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents or employees to the same extent as if they were a private person or a corporation." Apart from authorizing a "claims presentation" procedure (later declared unconstitutional), the statutes say nothing further about public entity-liability or immunity. However, the Washington Supreme Court, acting on the basis of what it regarded as sound policy concerns, has ruled, in accordance with what it perceives to be the legislation's underlying purposes, that an immunity exists for "truly discretionary" processes. Evangelical United Brethern Church v. State, 67 Wash. 2d 246, 407 P. 2d 440 (1965). Moreover, the Court has also indicated that suits against the government can raise a genuine tort issue of "duty" (see pp. 28 , 41).

4. New York

From the early nineteenth century, New York was in the traditional camp on the governmental immunity issue. In 1929, however, the New York legislature enacted a statute waiving the sovereign immunity of the state: the state "hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the Supreme Court against individuals or corporations" (N.Y. Ct. Cl. Act § 8). In 1945, in the case of Bernardine v. City of New York (294 N.Y. 361, 62 N.E. 2d 604 (1945)) the New York Court of Appeals interpreted this statute as waiving the immunity of local governments as well as the state itself.

It has fallen to the New York courts to interpret the scope of the liability established by the oblique language of the 1929 Act. Given the volume of judicial opinions eminating from New York courts, and given the lack of a statute as a way or organizing and given structure to the mass of opinions, New York law is nothing if not shaggy. (This shagginess confirms the strong

desirability of California-like codification.) New York courts have, however, clearly recognized some version of an immunity that is similar or analogous to the "discretionary" immunity which exists in some jurisdictions. (See pp. 14-16, infra.) Moreover, the courts have agreed that the "duty" issue often intrudes itself into suits against public entities. (See pp. 16, 32, 34 infra.)

5. Alaska.

The history of public entity tort liability in Alaska is greatly complicated by the historical peculiarities of Alaska as a governmental jurisdiction. Until 1962 the district court for the territory of Alaska recognized the traditional rule of governmental liability: that is, localities were immune for torts committed with regard to "governmental functions." See e.g., City of Fairbanks v. Gilbertson, 16 Alaska 590 (D. Alaska 1957), affirmed 262 F.2d 734 (9th Cir. 1959). In 1962, however, the new Alaska Supreme Court, interpreting the relevant statutes in Alaska (and in Oregon), essentially found that there was no basis for municipal immunity under Alaskan law. City of Fairbanks v. Schnaible, 375 P.2d 201 (Alaska 1962).

Later in 1962, the Alaska legislature enacted generally worded statutes clarifying the tort liability of states and local governments. The state-government statute (§ 09.50.250) authorizes in a general way the bringing of tort claims against public entities. However, it creates a number of significant immunities resembling the immunities found in the Federal Tort Claims Act. One of these immunities is for the exercise (or failure to exercise) a "discretionary function or duty..., whether or not the discretion involved is abused." There is a cluster of immunities covering a large number of intentional torts, including assault, battery, false arrest, defamation, and misrepresentation. There is also an immunity (unlike anything in the Federal Act) for "damages caused by the imposition or establishment of a quarantine by the state." The local-government statute (§ 09.65.090) in its original 1962 form authorized tort claims in a categorical way. That statute was amended, however, in 1977 to include a "discretionary function" immunity, and a number of more particular immunities, including a "license and permit" immunity and an "inspection" immunity.

C. Inevitable Immunity (or Quasi-Immunity) Issues.

Even when a jurisdiction professes to abrogate the doctrine of governmental immunity--indeed, exactly because the jurisdiction has professed such an abrogation--certain difficult issues inevitably arise.

1. Discretionary Acts.

The first concerns separation of powers, and considerations pertaining to appropriate tort law modesty. Assume a situation

(prior to the federal 55 mile per hour rule) in which the state legislature raises the speed limit from 65 to 90 miles an hour. After a 90-mile-per-hour motorist injures a victim, the victim sues the state, arguing that the action of the state legislature was unreasonably risky and hence tortious. Next, assume a judge who suspends sentence on a person convicted of a violent crime. Returned to society, the criminal commits an act of violence on another person, who then sues the state, alleging that the judge's decision was unreasonably risky and hence negligent.

Clearly, no rational tort system should tolerate tort claims of this sort. To permit a civil jury to review the wisdom of the legislature's statute would seriously disparage the legislature's authority in a way that is inconsistent with our norm of separation of powers. In the suit alleging the negligence of a judge, there may be no issue of separation of powers, per se, since the alleged tort itself occurred within the judicial branch. Nevertheless, it is clear that a proper understanding of tort law's limits should prevent a jury from reviewing the correctness of the judge's decision. Given our concern for separation of powers and appropriate tort law modesty, some version of an immunity--call it, preliminary, an immunity for "discretionary" acts--seems clearly necessary. How the jurisdictions selected for this study have fashioned their version of "discretionary" immunity is a subject that is discussed below.

2. Affirmative Duty.

The general rule of tort law is that one is liable for actions which negligently cause harm to another person. The converse rule, however, is that there is no liability when one simply omits to take action (however unreasonably) which might have been successful in preventing another person from falling victim to harm. That is, as a general rule, there is no duty to "rescue" or to "render assistance." This distinction between "causing" harm and merely "failing to prevent" is one with deep roots in the existing tort system. What is therefore noteworthy is that in many suits against public entities, the injured person's complaint runs not really to public-entity conduct that has caused his injury in any palpable way, but rather to public-entity omissions which simply have permitted the harm to come about. Of course, a further truth is that government, through all its agencies and programs, is so deeply involved in all of society's affairs that, with respect to government, the causation/prevention distinction is often difficult to perceive and to apply.

While tort law refuses to recognize a general obligation to provide protection to another, there are a number of important exceptions to this rule of no affirmative duties. If, for example, the defendant stands in a "special relationship" with

the victim, an affirmative duty may attach. Thus, a father can be held liable in tort for failing to rescue his son, and a nurse for failing to provide assistance to her patient. In the public sector, the resulting question is this: is the relationship between city and citizen one of those "special relationships" which justifies the imposition of an affirmative duty? (As we shall see, courts have unhesitatingly answered this question in the negative.)

In limited situations, courts recognize an affirmative duty when there is a "special relationship" between the defendant and the harm-causer. See Tarasoff v. Regents of University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (therapist-patient). Needless to say, there is no "special relationship" between a local government and an earthquake which would be legally relevant.

The Restatement of Torts (Second) contains another important exception to the no-affirmative-duty rule. "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize is necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such harm increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking" (Section 323; emphasis added). In many instances, public entities have in fact "undertaken" to render certain services. Assuming, therefore, that the Restatement provision applies to public entities, the questions that arise concern the extent to which the negligent non-performance of safety services "increases the risk of...harm" to the victim, and the extent to which there has been "reliance" on the undertaking that might detrimentally affect the victim if there is a negligent failure to execute the undertaking. Many of the sectors of public-entity tort law described below raise (at least by implication) the question of the proper application of the undertaking doctrine to public entities. It should be noted that some courts going beyond the Restatement, have imposed liability for any negligent failure to culminate an undertaking--without regard to "increased risk of harm" or "reliance." When the undertaking idea is interpreted this broadly, the liability exposure can be substantial--as is suggested by Adams v. State, 555 P.2d 235 (Alaska 1976) and State v. Jennings, 555 P.2d 248 (Alaska 1976). (See III-D, infra.)

3. Duty.

Apart from the problem of "affirmative duties," there is another issue, also called "duty," that is likely to emerge in suits against public entities as a consequence of any professed abrogation of the immunity doctrine. Common-law courts have often

worried greatly about rules of negligence liability that might impose liability "in an indeterminate amount for an indeterminate time to an indeterminate class." Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931) (Cardoza, C.J.). See also H. R. Moch Co. v. Rennssalaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928) (Cardozo, C.J.); Ryan v. New York Central R. Co., 35 N.Y. 210 (1866). In situations in which the public entity has merely failed to prevent harm, if liability were imposed it might well be "indeterminate" in a way that many courts would find disturbing. Therefore, in many contexts the no-affirmative-duty rule is strengthened and reinforced by an understandable concern about the imposition of what could be an indeterminate liability. Even in situations in which the public entity has genuinely (if indirectly) caused harm (rather than merely failing to prevent it), to recognize liability might well raise the spectre of indeterminacy. In these circumstances, many common law courts can be expected to proceed cautiously. These courts can accommodate their felt need for caution by recognizing a "duty" limitation on the basic liability rules for public entities. Instances of this duty limitation, arising sometimes even in the setting of negligently caused harm, will be noted below.

D. The Discretionary Immunity.

1. United States.

The leading decision on the meaning of the "discretionary function" immunity afforded by the Federal Tort Claims Act is Dalehite v. United States, 346 U.S. 15 (1953). This was a "disaster" lawsuit, with 8,500 plaintiffs bringing claims totalling more than $200,000,000 after much of Texas City was destroyed by the explosion of two ships carrying fertilizer-grade ammonium nitrate (FGAN). The plaintiffs' allegations concerned the government's negligence in adopting a general fertilizer export plan, its negligence in manufacturing the FGAN, and the negligence of government workers in supervising the loading of the ship. By a 4-3 vote, the Supreme Court found the "discretionary" immunity applicable to all of these negligence claims. The majority opinion's most conspicuous statements are as follows:

> It is the discretion of the executive or the administrator to act according to one's judgment of the best course (which entails immunity).
>
> The "discretionary function or duty" that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or adminstrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision, there is discretion.

> The decisions held culpable were all responsibly made at a planning rather than operational level...(and are therefore "discretionary").

As for the cases' results, the dissenters, in an opinion authored by Justice Jackson, agreed with the majority only on the government's non-liability for its adoption of the fertilizer program; the dissenters would have allowed the plaintiffs' other claims.

> We did not predicate liability on any decision taken at "Cabinet level" or on any other high-altitude thinking. Of course it is not a tort for government to govern, and the decision to aid foreign agriculture by making and delivering fertilizer is no actionable wrong.
>
> When an official exerts governmental authority in a manner which legally binds one or many, he is acting in a way in which no private person could. Such activities do and are designed to affect, often deleteriously, the affairs of individuals, but courts have long recognized the public policy that such official shall be controlled solely by statutory or administrative mandate and not by the added threat of a civil suit.

But the dissent continued that:

> The common sense of this matter is that the policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail.
>
> (This is one of those) many acts of government officials (which) deal only with the housekeeping side of federal activities.
>
> The government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper.

In my view, the differences between the majority and dissenting opinions in Dalehite are less than is often supposed. In particular, the majority's distinction between "planning" and "operational" seems almost interchangeable with the dissent's distinction between "policy" and "detail." The two opinions part ways largely in their characterization of the actions alleged to be negligent. The majority emphasizes, while the dissent ignores, the fact that the elements of the manufacturing process challenged as negligent had all been contained in a Plan drafted by the Office of the Field Director of Ammunition Plants in June, 1946, prior to the beginning of production; this Plan was based on a thorough review of the prior experience of both private enterprise and TVA. The dissent does differ from the majority in recognizing

a distinction between "governmental authority" negligence and "manufacturing" negligence; this is a distinction which the majority does not really consider. In endorsing the "discretionary" immunity for the negligent exercise of "governmental authority," Justice Jackson would almost certainly also approve of immunity for allegedly negligent failures to exercise "governmental authority," even when such a failure "affects, often deleteriously, the affairs of individuals." Here, Justice Jackson's concern about courts intruding into "governmental authority" would be reinforced by a concern about compelling government to exercise its authority in the first place.

Since Dalehite, the Supreme Court has provided little further clarification of the "discretionary" issue. In Indian Towing v. United States, 350 U.S. 61 (1955), the Court explicitly rejected the traditional governmental/proprietary function dichotomy for purposes of the Federal Tort Claims Act. Nothing in the Indian Towing opinion, however, really sheds new light on the pure "discretionary" question. Later Supreme Court opinions interpreting the Act, like Laird v. Nelms, 406 U.S. 707 (1972), have dealt with aspects of the Act other than its "discretionary" feature. By now, of course, there are patterns of decisions among lower federal courts. Thus motor vehicle driving, medical practice, and air traffic control services have been regularly held non-discretionary. (See the cases cited in Zillman, The Changing Meanings of Discretion: Evolution in the Federal Tort Claims Act, 76 Mil. L. Rev. 1, 12 (1977)). However, military activities like riot control and matters relating to foreign affairs have been deemed "discretionary." See id. at 13. The "planning vs. operational" distinction from Dalehite has been invoked by a large number of lower federal courts. See cases cited in Comment, Federal Tort Claims: A Critique of the Planning-versus-Operational Level Test, 11 U.S.F.L. Rev. 170, 179 n. 60 (1976). There are indications that the rank of the government official who makes the allegedly tortious decision is relevant to its discretionary quality; the higher the rank, the more likely a "discretionary finding." See id. at 181; see also Justice Jackson's rejection of liability in the event of Cabinet-level decision-making. One important recent case is Griffin v. United States (500 F.2d 1059 (3d Cir. 1974). Here, the plaintiff was rendered a paraplegic by her consumption of a dose of Sabin vaccine which had been negligently tested--and hence released to the public--by the Division of Biological Standards within the federal Department of Health, Education and Welfare. Plaintiff's complaint focussed on DBS's failure to comply with relevant standards established by the Surgeon General. However, these standards clearly called for a great deal of expertise in their application. In denying immunity, the Third Circuit reasoned that DBS's determinations involved "judgment" of a very real sort--but that the judgment in question was "professional" or "scientific" judgment, and that it is only "policy-making" or governmental judgment which the "discretionary" immunity seeks to protect. This Griffin reasoning seems quite close to the "governmental" vs. "manufacturing" reasoning set forth in Justice Jackson's Dalehite dissent.

2. California.

The California Act contains a number of specific immunities that are explained (or explainable) as the Legislature's specification of appropriate applications of the basic "discretionary" immunity which the Act sets forth. Thus under § 818.2, a public entity is seemingly immune "for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law."

The leading California case on the "discretionary" issue is Johnson v. State (69 Cal. 2d 782, 447 P.2d 352, 73 Cal. Rptr. 240 (1968)). Here the Youth Authority paroled a youthful offender to a foster family. A low-level Youth Authority employee failed to notify the foster family of the youth's dangerous tendencies. As a result, the family welcomed the parolee, who in turn committed an act of violence upon the family. In discussing the discretionary immunity, the Supreme Court adopted a "ladder" imagery. At the highest rung of the ladder is the formulation of the general standards for parole; this formulation, the Court indicated, is purely discretionary. At the ladder's middle rung is the decision to parole a particular individual. This decision, the Court stated, is also discretionary. At the bottom of the ladder is the decision to withhold information from the foster family. This low-rung decision, the Court held, was merely ministerial and hence not covered by the discretionary immunity.

Elsewhere in the Johnson opinion, the Court picks up language from Dalehite, suggesting that the discretionary immunity applies to "basic policy decisions," or decisions which occur at the "planning" rather than the "operational" level. However, this line of linguistic reasoning seems inconsistent with the Court's specific reasoning about parole decisions. Certainly, a decision to parole a particular individual is not a "general policy decision;" and it clearly exists at a "operational" rather than at a "planning" level. Nevertheless, the Court tells us explicitly that such a decision should be regarded as "discretionary." Likewise, it seems clear that the Johnson Court would recognize the "discretionary" quality of a judge's decision to suspend a sentence, "operational" though that decision might be. It appears, therefore, that many actions are covered by the "discretionary" immunity--notwithstanding their evidently "operational" quality--because of what could be called their "governmental" character. If, as Justice Jackson indicated, "it is not a tort for government to govern," then it is "acts of governance" that should be deemed immune; and decisions to parole or to suspend sentence clearly come within this classification.

The Johnson opinion is supportive of the federal idea that the office of the decision-maker may influence the "discretionary" nature of his decision. (There are few cases reported under the Act in which either the Governor or any other high executive official has

been charged with "tortious" conduct.[1]) The Johnson opinion emphasizes that the decision not to warn was made by a mere parole agent. Likewise the Court's opinion, especially when compared to the Court of Appeal's opinion which it set aside, illuminates the point that the characterization of the public-entity's action may bear in a major way on the assessment of its "discretionary" character. According to the Johnson Court, "this is a classic case for the imposition of tort liability. Defendants failed to warn plaintiff of a foreseeable latent danger, and this failure led to plaintiff's injury from precisely the expected source. Courts encounter this type of allegation daily and are well suited to resolve its validity under traditional tort doctrine." Compare, however, the characterization of the Johnson problem that appears in the Court of Appeal opinion (65 Cal. Rptr. 717 (1968)), authored by Justice Kaus, and concurred in by Justice Shirley Hufstedler:

> We do not believe that it can be questioned that the decision to parole a particular youth and the selection of the foster home are immune decisions. It follows that the decision not to inform the prospective foster parents of certain tendencies of the ward must also be sheltered by the immunity.
>
> We may assume that the Youth Authority could live with the rule which requires that it disclose such known facts about the parolee's past life as would indicate that he might murder the prospective foster parents. Yet it is apparent that if a court today announces such a rule, the decision would merely be a foot in the door for a far more sweeping rule of compulsory disclosure. If homicidal tendencies might be disclosed, it would be impossible to draw the line between the particular trait and others which might be thought of interest to the prospective foster parent. Every decision to parole and place in a home would become a possible lawsuit.

If the decision not to inform in Johnson had been rendered by the Youth Authority itself, and if it had been arrived at on the stated grounds that foster families might tend to overact if advised on their charges' dangerous tendencies, it is quite likely that the Supreme Court would have accepted the "discretionary" claim.

One final noteworthy feature of the Johnson opinion consists of a dictum set forth in a footnote: in order to quality for the "discretionary" immunity, the government must show that the decision-maker actually took into account the relevant risks and benefits in reaching his decision.

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[1]For one recent--and quite unsuccessful--attempt to sue the Attorney General, see Roseville Community Hospital v. State, 74 Cal. App. 3d 583, 141 Cal. Rptr. 593 (1977).

The Supreme Court decisions subsequent to Johnson have not been all that helpful in amplifying the meaning of "discretionary." In McCorkle v. City of Los Angeles (70 Cal. 2d 252, 449 P.2d 453, 74 Cal. Rptr. 389 (1969)), the Court held that a policeman's decision to investigate an auto accident may well be discretionary, but that negligence on his part in conducting that investigation--in particular, forcing an accident witness to assume a dangerous position on the street--fell outside of the "discretionary" category. In Tarasoff v. University of California Board of Regents (17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976)), the famous case involving the psychiatrist who failed to disclose to the potential victim his patient's homicidal tendencies, the Court ruled that the psychiatrist's decision, though highly professional, was not discretionary. Here the Court, at least by implication, accepted the federal Griffin view that it is governmental or policy-making discretion, rather than professional or scientific discretion, that the immunity requires.

While there are an array of lower court cases on the "discretionary" issue, they are not enormously helpful. It is supposedly clear that a false arrest committed by a policeman is not discretionary; yet in Michenfelder v. City of Torrance, 28 Cal. App. 202, 104 Cal. Rptr. 501 (1972), a Court of Appeal essentially held that a negligent failure to make an arrest is discretionary. In Paddleford v. Biscay (22 Cal. App. 3d 139, 99 Cal. Rptr. 220 (1971)) a Court of Appeal, ruling implied on "discretionary" grounds, banned a tort suit against the state alleging that a judge, in a completely illegal way, had printed up essentially blank arrest warrants bearing his own stamped-on signature, to be used by public officers when and as they pleased.

If there have been interesting Court of Appeal opinions affirming immunity, there have been an almost equal number of interesting opinions going the other way. In Elton v. County of Orange, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970), for example, the state's negligence in investigating the personalities of foster parents was held to be non-discretionary and hence not immune, in a suit by the foster child whom the foster parents had physically abused.

3. Washington.

The Washington Supreme Court, in its 1965 Evangelical decision, engrafted by judicial decision a "discretionary"-type immunity onto the state legislature's waiver of governmental immunity. According to the Court, the immunity applies to "truly discretionary" acts, the criteria for which is described as follows:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program, or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program or objective as opposed to one which

> would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision? If these preliminary questions can be clearly and unequivocally answered in the affirmative, then the challenged act, omission, or decision can, with a reasonable degree of assurance, be classified as a discretionary governmental process and nontortious, regardless of its unwisdom. If, however, one or more of the questions call for or suggest a negative answer, then further inquiry may well become necessary, depending upon the facts and circumstances involved.

The first of the two "if" sentences which end this paragraph suggests an extremely narrow immunity; but the second "if" sentence suggests a rather open-ended immunity the scope of which cannot be reliably predicted.

In the Evangelical case itself, a youth sent to a youth home was assigned by the youth-home's managers to its "open program." From that program he escaped, and set fire to the plaintiff's nearby property. The Court held that the establishment of the open program within an otherwise closed facility was a "discretionary" act; more interestingly still, it held that the assignment of the particular boy to the open program was discretionary as well. The Court conceded the possibility of liability only with respect to the taking of inadequate precautions to prevent the boy's escape.

Later cases from Washington courts have commented on the "truly discretionary" immunity. J.S.K. Enterprises, Inc. v. City of Lacy, 6 Wash. App. 433, 493 P.2d 1015 (1972), held that the good-faith enactment of an ordinance by a city is automatically discretionary, however mistaken or even unconstitutional the ordinance may be. Mason v. Britton, 85 Wash. 2d 321, 534 P. 2d 1360, (1975), imposed liability on the state for negligence in a high-speed police chase; here the court relied on the planning/operational distinction. In Creelman v. Svenning, 67 Wash. 2d 882, 410 P.2d 606 (1966), the Supreme Court held that a county prosecutor was absolutely immune, on discretionary grounds, from a claim of malicious prosecution. In Gold Seal Chinchillas, Inc. v. State, 69 Wash. 2d 828, 420 P.2d 698 (1966), the Superior Court found the state to be absolutely privileged (at least against any charge or defamation) "with respect to the content of (state officials') oral pronouncements or written publications."

4. New York.

In New York, as in Washington, the court system has been required to deal with a statute that is largely silent on the issue of a separation-of-powers-type immunity. The New York Court of Appeals rose to

the occasion, however, in Weiss v. Fote (7 N.Y. 2d 579, 167 N.E. 2d 63, 200 N.Y.S. 2d 409 (1960)). Here a motorist sued the city, complaining that traffic lights had been poorly designed for a particular intersection. The Court, in denying the suit, reasoned as follows:

> In the case before us, the Common Council of Buffalo, acting through its delegated agent, the Board of Safety, made extensive studies of traffic conditions at the intersection.... It was considered judgment, based on studies, that four seconds represented a reasonably safe "clearance interval" and there is nothing to suggest that its decision was either arbitrary or unreasonable. To state the matter briefly, absent some indication that care was not exercised in the preparation of the design and that no reasonable official could have adopted it... we perceive no basis for preferring the jury verdict... to that of the legally authorized body which made the determination in the first place.... The city's defense which we here sustain rests not on any anachronistic concept of sovereignty, but rather on a regard for sound principles of government administration and a respect for the expert judgment of agencies authorized by law to exercise such judgment. In the area of highway safety, at least, it has long been the settled view, and an eminently justifiable one, that courts should not be permitted to review determinations of government planning bodies under the guise of allowing them to be challenged in negligence suits; something more than a mere choice between conflicting opinions of experts is required before the state or one of its subdivisions may be charged with a failure to discharge its duty to plan highways for the safety of the traveling public.... Although a jury verdict is to be highly regarded, it is neither sancrosanct nor preferable to the judgment of an expert public planning body. For this reason, liability for injury arising out of the operation of a duly executed highway safety plan may only be predicted on a proof the plan was evolved without adequate study or lacked reasonable basis.

Three judges of the seven-judge Court dissented. Weiss v. Fote establishes some sort of an immunity-type defense in New York. However, what the scope is of that defense remains highly uncertain, at least outside of the public-property context in which the Weiss opinion was itself written. Some New York lower courts have relied on Weiss for purposes of establishing a discretionary-vs.-ministerial distinction. See, e.g. Crisafulli v. State, 37 A.D.2d 688, 323 N.Y.S.2d 320 (1971). Other opinions rely on Weiss v. Fote to deny liability on grounds that the public decision in question "is sovereign in character and completely foreign to any activity which could be carried out

by a private person." Bellows v. State of New York, 37 A.D.2d 342, 325 N.Y.S.2d 227 (1971). Other opinions e.g. Van Buskirk v. State of New York, find immunity for "governmental functions of a quasi-judicial nature." 38 A.D.2d 349, 329 N.Y.S.2d 381 (1972). Some opinions tersely refer to an immunity for "governmental discretion." Karras v. State of New York, 748 A.D.23, 48, 368 N.Y.S.2d 327 (1975). A recent Court of Appeals opinion refers to the "old, sometimes blurred" distinctions between "governmental, ministerial, and proprietary." Pratt v. Robinson, 39 N.Y.2d 554, 349 N.E.2d 849, 384 N.Y.S.2d 749 (1976). If it is true that the governmental/proprietary distinction survives in New York, it is evidently being applied to the particular act alleged to be actually tortious, not (as in traditional days) to the general bureau of government in whose name the tortious act may have been committed. As so revised, the governmental/proprietary distinction may make good sense, and is in line with federal "discretionary" reasoning contained in Griffin and in Jackson's Dalehite dissent.[1] (In Pratt itself, a divided Court relied not on the "old, blurred" distinction, but rather on the concept of "duty," in denying a school district's liability for not taking into account, in planning school bus routes, the street hazards that students face on their walks from the bus-stop to their homes.)

5. Alaska.

There are two leading cases on the "discretionary function" immunity in Alaskan law. The first is State v. Abbott, 498 P.2d 712 (Alaska, 1972). Here the state had been allegedly negligent in its winter-time maintenance of a slick curve on a state highway. The state claimed the "discretionary function" immunity for its maintenance activities. The Alaska Supreme Court adopted the planning vs. operational distinction set forth in the majority opinion in Dalehite; in general, however, the Alaska Court indicated its sympathy with Justice Jackson's Dalehite dissent. The Alaska Court also was explicit in its acceptance of the guidance of the California Supreme Court in Johnson v. State; it therefore rejected the "semantic" definition of discretionary--a definition that would find that "discretion" exists whenever a public decision-maker has some range of legal choice. The policies which the Alaska Court regarded the discretionary function immunity as furthering are (1) separation of powers, (2) the functional inability of courts to investigate and balance the correctness of executive and legislative decisions, and (3) the need to avoid what could otherwise be an intolerable deluge of litigation challenging governmental decisions.

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[1] On its facts, Weiss involved highway building. As such the "discretion" in question can be regarded as "engineering" discretion rather than "governmental" or "policy" discretion. If so, then Griffin and the Jackson dissent might disapprove of the actual Weiss rule (and also of its California counterpart).

Applying this learning to the Abbott facts, the Court determined that the original decision to provide maintenance services to a state highway during the winter by salting, sanding, and plowing the highway is evidently discretionary, but that the implementation of that decision by particular district engineers is operational and hence not immune. The Court conceded "that the district engineer's decision as to how many men and how much equipment were necessary to maintain this particular stretch of highway involved a certain amount of planning and discretion..." But the Court still found the engineers' negligence non-discretionary, relying (in a significant footnote) on the fact that the level of maintenance services provided fell below the level required by detailed regulations for highway maintenance that had been promulgated for the entire state. "Failure to comply with (these regulations) would seem to be operational negligence rather than policy-making negligence."

In Adams v. State, 555 P.2d 235 (Alaska 1976), the Court elaborated further on the "discretionary function" immunity in the context of a lawsuit against the state for its negligent failure to abate an illegal fire hazard detected by a state building inspection. The Adams Court distinguished between "the basic policy decision to undertake an activity," which is immune, and "the execution" of that decision, which is not immune. "In this case, the discretionary act could be described as the decision to inspect the (hotel); the negligent performance of that inspection would then be an operational or ministerial act, and thus not immune."

E. The Relevance of a "Mandatory Duty."

As noted above, in California a public entity is liable if it has failed to comply with a "mandatory duty" imposed by "an enactment," so long as the statute or regulation was designed to protect against the kind of injury that actually occurred, and the public entity's attempt to comply with the statute or regulation was somehow less than "reasonable" (§ 815.6). This "mandatory duty" clause affords an independent basis of liability under the California Act. Given its presence in the Act, state statutes or regulations imposing obligations on local governments have major tort potential; the word "shall" in such a statute or regulation thus commands attention.

"Shall" language in a statute must of course be looked at to determine whether it really means "shall" rather than merely "may." But as a general matter the power of "shall" was reinforced in Morris v. County of Marin, supra, in which the California Supreme Court rejected the idea that some "shall" statutes can be understood as being "directory" rather than "mandatory" in character and therefore not relevant to the "mandatory duty" clause. The Court's holding was that the directory/mandatory distinction--legally important in certain contexts--does not serve to limit "mandatory duty" liability. However, if a statute which imposes an obligation on a public entity also contains a clause which clearly states that the public entity's noncompliance should carry no tort law

implications, this legislative disclaimer can effectively preclude a "mandatory duty" argument. See Brock v. State, 81 Cal. App. 3d 752, 146 Cal. Rptr. 716 (3d Dist. 1978).

What if the mandatory duty is imposed not by the state, but rather by the local government itself, by way of one of its own ordinances or charter provisions? Whether a city's violation of its own ordinance comes within the "mandatory duty" clause is uncertain. One question is whether a mere ordinance, as such, classifies as an "enactment" within the sense of the clause; the answer to this question is apparently affirmative (§ 810.6). Another question is whether "mandatory-duty" liability depends on one government's violation of an obligation imposed on that government by a superior government. In Elson v. Public Utility Comm'n., (51 Cal. App. 3d 577, 124 Cal. App. 305 (1973)), the Commission had promulgated an order calling for the revocation of the permit of a regulated common carrier if the carrier failed to secure an appropriate liability insurance policy. Then, however, the Commission overlooked its stated policy in a particular situation--as as a result of this, a person injured by a carrier's negligence was left with a tort judgment against the carrier which was effectively uncollectible. In the victim's suit against the Commission, a Court of Appeal, in holding that the mandatory-duty clause imposed liability, did not pause to consider whether the clause really applies when an agency merely neglects its own order. In Morris v. County of Marin, 18 Cal. 3d 901, 559 P.2d 606, 136 Cal. Rptr. 251 (1977), the California Supreme Court indicated its general approval of the Elson opinion, but the Court likewise did not advert to the special factor of the public entity's violation of its own order.

Neither federal, Washington, nor New York law includes an explicit "mandatory duty" liability rule of the sort that exists in California. For this reason, California law provides liability possibilities that may be lacking in those other jurisdictions. However, even in those jurisdictions, the fact that a local government has violated some legal obligation may well possess major liability relevance. One important element of relevance is this: when the public entity's claim is that its allegedly negligent act is "discretionary" but if the particular act is itself forbidden by law, the discretionary claim is almost certain to fail; "mandatory duty" negates "discretion." In Washington, see Walters v. Hampton, 14 Wash. App. 548, 543 P.2d 648 (1975). For federal law, see Hatachley v. United States, 351 U.S. 173 (1956); Ingham v. Eastern Air Lines, 373 F.2d 227 (2d Cir. 1967); Duncan v. United States, 355 F. Supp. 1167 (D.D.C. 1973). Likewise, courts may find that a city's violation of a state statute (or even a city code) may be a reason for recognizing a "duty" running to the plaintiff in circumstances where, absent the violation, "duty" might be found lacking. And when the issue is simply whether the city's conduct classifies as "negligent," courts might well conclude that the city's violation of state law constitutes "negligence per se."

F. Claims Presentation Requirements.

Most states which have enacted statutes allowing tort claims against local and state governments have included in those statutes a "claims presentation" procedure requiring that the would-be plaintiff notify the public

entity of his tort claim within X days after the original accident. (The California period is 100 days. See Government Code § 911.2). Since the failure to present the claim within this period renders the claim legally unenforceable, the requirement functions as a very short statute of limitations (although it is not called such). There is early authority for the constitutionality of the California requirement--but it takes the form of a cryptic paragraph in an opinion authored by Justice McComb. Tammen v. County of San Diego, 66 Cal. 2d 468, 426 P.2d 753, 58 Cal. Rptr. 249 (1967).

In the early 1970's, the Michigan Supreme Court declared the Michigan claims presentation requirement unconstitutional. See Reich v. State Highway Dept., 386 Mich. 617, 194 N.W.2d 700 (1972). There has been a wave of constitutional litigation in other jurisdictions ever since. The Nevada Supreme Court quickly followed the Michigan lead. Turner v. Staggs, 89 Nev. 230, 510 P.2d 879, cert. denied, 414 U.S. 1079 (1973). In Washington--one of the jurisdictions under study--the State Supreme Court at first upheld (in dictum) the Washington requirement, Cook v. State, 83 Wash. 2d 599, 521 P.2d 725 (1974), and then a year later changed its mind, finding the statute a violation of equal protection. Hunter v. North Mason High School, 85 Wash. 2d 810, 539 P.2d 845 (1975). In a clear majority of states, the requirements have been upheld. See, e.g., Batchelder v. Haxby, 337 N.E.2d 887 (ind. 1973). In California, the lower California courts have continued to follow the McComb precedent. See Roberts v. State of California, 39 Cal. App. 3d 844, 114 Cal. Rptr. 518 (1974), but the Supreme Court has done no more than brush the issue in recent years. See Whitfield v. Roth, 10 Cal. 3d 874, 889-90 n. 20, 519 P.2d 588, 112 Cal. Rptr. 540 (1974).

II. LIABILITY FOR HARM CAUSED BY THE ISSUANCE OF A NEGLIGENT EARTHQUAKE WARNING, OR FOR HARM CAUSED BY A NEGLIGENT FAILURE TO ISSUE AND EARTHQUAKE WARNING

Precis:

In California, the issuance and the decision to issue an earthquake warning seems clearly immune. When such a warning is issued by the Governor himself, the warning decision is specifically immunized by a new statute, Government Code § 995.1. Even without § 955.1, the decision to issue a warning, whether rendered by the Governor or by a City Mayor, is almost certainly covered by the general "discretionary" immunity which the Tort Claims Act sets forth. Such a decision seems exactly the kind of "basic policy decision" which that immunity is intended to reach. If, however, the public entity's negligence comes in the gathering or evaluation of evidence or information that leads up to the decision as to whether a warning should be issued, the result may be uncertain. It seems uncertain under the very confused terms of § 955.1, and it is also uncertain under the more general terms of the Tort Claims Act.

Connelly v. State did find liability for negligence in the gathering of information leading up to the issuance of an improper river forecast. But it is hardly clear that Connelly accurately states California law. (It is, after all, only a Court of Appeal opinion, and there have been no later cases amplifying the issue.) In any event, a weather forecast or river forecast can be sharply distinguished from an earthquake warning, since the former is a day-to-day routine matter, while the latter is by its very nature extraordinary or exceptional. Strong arguments can be made against the Connelly holding, and in favor of the idea that governments should be generally immune for information which government releases to the general public and which turns out to be mistaken. The problem is that the Tort Claims Act does not explicitly consider this area of governmental activities.

The Tort Claims Act does contain an immunity for "misrepresentation," but a weather or river forecast is so far from the ordinary commercial context of the misrepresentation tort as to lend support to the Connelly view that the misrepresentation immunity does not cover such forecasts. At the federal level, however, there have been a number of lower court opinions findings that the "misrepresentation" immunity in the Federal Tort Claims Act does cover, in a general way, mistakes in the issuance of public information. However, these cases are suspect, insofar as they ignore the theory of the federal misrepresentation immunity that has been suggested by the United States Supreme Court in an important footnote.

The failure to issue an earthquake warning when--at least with the benefit of hindsight--a warning was really in order would generally be immune, in California and elsewhere. Just as the decision to issue a warning seems clearly discretionary, so the decision not to issue such a warning is equally discretionary and hence immune in all the jurisdictions under

study, all of which have adopted some version of the discretionary immunity. Moreover, "discretion" apart, to prevail in a tort case when the defendant merely has failed to act, one must establish that the defendant was under an affirmative duty to act. And absent special circumstances, tort law imposes no affirmative duty on public entities to issue earthquake warnings. Only if the public entity has publicly committed itself to issue such a warning should the need arise and if members of the public rely in significant ways on that commitment could a tort court possibly reach a conclusion that a basis exists for an affirmative duty.

A. Compensability of Loss.

1. California.

Under the California Tort Claims Act, a tort action for harm caused by the negligent issuance of an earthquake warning would need to be derived from the general principle of negligence liability, as applicable to public employees and vicariously to their public employers. (Since there is no "mandatory duty" to issue such warnings, no basis exists for "direct" public-entity liability.) Preliminarily, there is some question as to whether the kind of harm that is likely to ensue from the negligent issuance of an earthquake warning is even compensable under the California Act. The Act provides relief against "injury." According to § 810.8, "injury" means "death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings, or estate, of such nature that it would be actionable if inflicted by the person." According to the Law Revision Commission's Comment, the purpose of the definition is to "make clear that public entities and public employees may be held liable only for injuries to the kind of interests that have been protected by the court in actions between private persons." It is far from clear that the kind of economic loss which, for example, a business would suffer in the event that its prospective patrons failed to do business there because of an earthquake warning fits within the § 810.8 definition of injury. In Seely v. White Motor Co., for example, the California Supreme Court indicated that mere economic loss, unaccompanied by physical injury or actual property damage, was beyond the jurisdiction of tort law (or at least of its products liability branches). 63 Cal.2d 9, 403 P.2d 145, 45 Cal.Rptr. 17 (1965). California law does recognize, however, a limited number of purely "economic" torts, like inducement to breach of contract. See, e.g., Imperial Ice. Co. v. Rossier, 18 Cal. 2d 33, 112 P.2d 631 (1941). Most of these are intentional torts, although others, like attorney malpractice, sound in negligence.

In any event, in a number of cases, California courts have allowed recovery under the Act in circumstances where it was by no means clear that a § 810.8 injury had been suffered. In Morris v. County of Marin (18 Cal. 3d 901, 559 P.2d 606, 136 Cal. Rptr. 251 (1977)), for example, the plaintiff's grievance concerned the uncollectibility of his worker's compensation claim against his employer, and uncollectibility due to the public entity's failure to make sure that the employer, as an applicant for a building permit, was properly insured for worker's compensation. The California Supreme Court allowed recovery without even discussing whether

the inability to collect a worker's compensation award is a "loss of property" within the sense of § 810.8. Likewise, in Ramos v. County of Madera (4 Cal. 3d 685, 484 P. 2d 93, 94 Cal. Rptr. 421 (1971)), the Supreme Court allowed a recovery under the Act when the plaintiff's grievance was that they had been illegally deprived of welfare payments; the Court did not even bother to discuss whether the deprivation of welfare payments could be regarded as a "loss of property" within the meaning of § 810.8. Since cases like Morris and Ramos do not at all discuss the "injury" issue, their holdings on "injury" are at best implicit and uncertain. It would therefore be quite possible, in an earthquake warning case, for a public entity to raise, in a serious way, the argument that the plaintiff's grievance does not involve a § 810.8 injury.

2. Out of California.

In other states, there is a lack of any specific provision, like § 810.8, that seeks to establish the boundaries of tort law. Courts in states like New York and Washington have been willing to entertain tort claims that involve mere economic detriment. In New York, see Rottkamp v. Young, discussed at pp.32 infra (recovery denied on other grounds). In Washington, see Haslund v. City of Seattle, discussed at pp.40-41, infra. ($3,000,000 recovery affirmed.) If, however, these cases relate to the proper "jurisdiction" of tort law, in none of the cases has the "jurisdictional" issue been clearly asserted by the public-entity defendant. Hence their firmness as precedent is somewhat uncertain.

B. Basis of Liability.

In any "warning" case brought under California, federal, Washington, or New York law, plaintiff would be relying on a theory of negligence--the public entity's negligence in issuing (or not issuing) a warning, or its negligence in gathering the information on that basis of which the warning decision is made. As a general matter, "negligence" is actionable in suits against public entities in any of these jurisdictions.

C. The "Misrepresentation" Immunity.

Both California and federal law contain an immunity for "representation." Does a negligent warning classify as a "misrepresentation," which is therefore immune?

The federal immunity is found in the Federal Tort Claims Act, 28 U.S.C. § 2680(h). In Indian Towing Co. v. United States, 350 U.S. 61 (1955), the Supreme Court found liability under the Act when Coast Guard negligence caused a lighthouse to malfunction, resulting in damage to the plaintiff's vessel when it ran aground. Neither the five-Justice majority nor the four-Justice dissent discussed misrepresentation. The majority opinion does reason that the "Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light . . . and engendered reliance on the guidelines afforded by that light, it was obligated to use due care to make certain that the light was kept in working order." United States v. Neustadt, 366 U.S. 696 (1961), dealt with the liability implications of a

negligent FHA inspection and appraisal of a parcel of property, the purchaser's reliance on which caused the purchaser to suffer economic harm. This claim the Court found barred by the misrepresentation immunity. The Court observed, in a footnote, that its ruling was not inconsistant with the result in Indian Towing. According to that footnote, the immunity is limited to the traditional discrete tort of misrepresentation, a tort which itself is confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings," 366 U.S. at 711, n. 26, quoting Prosser.

If the Neustadt footnote is correct, it would seemingly follow that the misrepresentation immunity would not apply to a negligent earthquake warning, let alone to a negligent failure to warn. Neither Indian Towing nor Neustadt involved public-information-dissemination of an ordinary sort. However, a number of "public information" cases have been decided in the lower federal courts. In Clark v. United States (218 F.2d 446 (9th Cir. 1954)), a federal agency responsible for a housing project along the Columbia River reported that the dikes along the river were safe for the time being. In fact, the next day the dikes gave way, resulting in property damage and loss of life. The Ninth Circuit held that even if the government's assessment was negligent (which it wasn't), the plaintiff's claim would be barred by the federal misrepresentation immunity. It should be noted that Clark comes prior to the Supreme Court's decision in Neustadt, and its footnote. In In re Silver Bridge Disaster Litigation (381 F. Supp. 931 (S.D.W. Va. 1974)), a federal document had stated that a bridge over the Ohio River was capable of carrying a certain weight. In fact it was not so capable, and because of its inadequacies several motorists died when the bridge collapsed. A district court held their claim against the United States barred by the misrepresentation immunity. But the District Court's opinion did not mention the Neustadt footnote. In Western Steel Building, Inc. v. Adams (286 F. Supp. 570 (D. Colo. (1968)), the Department of Agriculture published a brochure describing the stress that certain kinds of barn walls can withstand. A farmer built his barn relying on the brochure's description. The description was erroneous and negligent, as a result of which the wall collapsed. The owner's tort claim was held barred by the misrepresentation immunity. Once again, the Neustadt footnote was ignored.

Since Clark predates Neustadt, and since Silver Bridge and Western Steel neglect it, one is not sure about the precedential weight which these cases should be regarded as carrying. It is noteworthy that the Ninth Circuit has recently overruled two of its earlier decisions which had held that a doctor's negligent diagnosis, as communicated to his patient, was covered by the misrepresentation immunity; in ruling that such cases should now be regarded as actionable, the Ninth Circuit confessed that its earlier opinions had ignored Neustadt in an improper way. Ramirez v. United States, 567 F.2d 854 (9th Cir. 1977).

In California, the misrepresentation is absolute for public entities (§ 818.8) and is also applicable to public employees, unless their misrepresentation is intentional (§ 822.2). (It can be safely assumed that earthquake predictions which are maliciously and deliberately false are beyond the scope of the ABAG project.) There is significant California case law on the misrepresentation immunity in its application to warning cases.

In Johnson v. State, the Youth Authority, as noted above, placed a parolee in a foster home without giving the foster family an appropriate warning concerning the youth's violent (indeed homicidal) tendencies. After the youth attacked and seriously injured the foster family mother, she sued the state, alleging negligence in the failure to warn. The state defended, in part, by invoking the "misrepresentation" immunity. The Supreme Court found the immunity inapplicable. Misrepresentation, the Court indicated, "as a tort distinct from the general milieu of negligence and intentional wrong, applies to interferences with financial or commercial interests. The legislature designed § 818.8 to exempt the government entity from this type of liability." In coming to this assessment, the California Supreme Court, like the U.S. Supreme Court, ruled on Dean Prosser's characterization of the misrepresentation tort, which also draws a sharp distinction between ordinary negligence claims that happen to involve some misstatement of fact and the "bargaining" economic-loss cases that really involve misrepresentation as an independent theory of recovery.

In Connelly v. State, 3 Cal. App. 3d 744, 84 Cal. Rptr. 257 (1970), a marina owner alleged that a forecast for the Sacramento River released to the public by the State Department of Water Resources had been flawed by a negligent breakdown in the collection of information. The plaintiff further alleged that he had personally telephoned a DWR office to secure the forecast, identifying himself as a businessman who had a particular economic interest in the forecast. He went on to allege that having received the forecast, he adjusted the height of his docks in accordance therewith, and that the docks suffered damage when the river level turned out to be higher than the DWR's prediction.

A divided state Court of Appeal ruled that the marina owner had stated a cause of action under a general negligence theory, holding that the misrepresentation immunity did not apply. In reaching this result, the Court, interestingly enough, did not rely on the idea that the dock owner had suffered "damage to property," rather than mere "commerical loss;" the Court seemed willing to assume that property damage is a species of economic detriment for misrepresentation purposes. The Court's reasoning focussed instead on the absence of a "commercial transaction" between the marina owner and the state, an absence which the Court thought eliminated the misrepresentation immunity, given the interpretation imposed on that immunity by Johnson. The Court suggested, however, that liability might not exist if the marina owner had merely been a member of the general public; the Court relied on the marina owner's alleged telephone calls as something which took him "out of the realm of the amorphous public." Given the Court's general line of reasoning, this particular point seems quite interestingly anomalous; the more direct the relationship between the plaintiff and the defendant, the closer the case comes to a traditional "misrepresentation" situation. Perhaps the Court meant to imply some general "duty" limitation that might constrain a claim of negligence in the reliance of information to the public. After the Supreme Court denied a hearing (Justice Burke dissenting), Connelly came down for trial. At trial, the Connelly plaintiff was unable to prove his facts--mainly, the phone call--and therefore lost the case. Apparently, in the eight years since

Connelly there has not been a single California lawsuit filed against either the state or any local government based on anything resembling a Connelly theory.

In 1974, the Department of Water Resources introduced legislation (through Assemblyman MacDonald) which would have reversed the result in Connelly. This legislation was not strongly pushed, and eventually died in the Assembly Judiciary Committee, apparently because of the opposition of the California Trial Lawyers Association.

The implications of the Connelly opinion are interesting in several ways. First of all, it seems clear that the general "misrepresentation" immunity, as interpreted in Johnson and Connelly, is entirely improper. When the government does enter the marketplace to participate in economic transactions, there is absolutely no reason to relieve it of liability for misstatements that would be actionable if made by a private party. Yet this is exactly the liability which the existing immunity clearly eliminates. On the other hand, there are strong intuitive arguments in favor of an immunity rule with respect to information that government provides to the general public--and especially information in the form of forecasts. Yet these are the cases which the existing misrepresentation immunity applies to, if at all, only in a very awkward way. There is no indication that the California legislature (or the federal Congress) gave any real thought to the "public information" problem in approving the California (or Federal) Tort Claims Act. The problem was recently considered by the California Citizens' Commission on Tort Reform (a privately funded entity); the Commission's conclusion is that a new immunity is needed specifically to cover negligently prepared public forecasts. See Righting the Liability Balance 172 (1977).

D. Discretionary Immunity.

In California, the Governor's Office, belatedly responding to Connelly, introduced legislation in 1976, through Senator Alquist, concerning immunity for earthquake predictions. The original Alquist bill would have precluded in a categorical way all public entity liability in the event of an earthquake. The bill which the Legislature finally passed (§ 955.1 of the Government Code) is much narrower--and rather tricky. It stipulates that "the Governor may, at his discretion, warn the public as to the existence of an earthquake prediction determined to have scientific validity. The state and its agency shall not be liable for any injury resulting from the decision to issue or not to issue a warning pursuant to this subdivision." The legislation elsewhere states that it is not intended to "provide immunity for government officials and other government employees acting in a non-discretionary capacity from liability for injuries arising out of ordinary negligence." Given this provision, it may well be that this new legislation does not rule out liability if there is employee negligence in the gathering or evaluating of earthquake information which is eventually presented to the Governor for purposes of his determination as to whether to make an earthquake prediction (see below). The State Attorney General's Office is quite aware of the ambiguities of the legislation; it regards the legislation as all but useless.

Under § 955.1, the Governor's decision, on the basis of information before him, to issue an earthquake warning--even though private harm is forseeable if the warning (for whatever reason) turns out to be incorrect--is specially "discretionary" and hence immune. But even without reference 955.1, such a decision to warn--or not to warn--would certainly classify as "discretionary" for purposes of the California Act's general immunity. (For this reason, § 955.1 is largely superfluous). The narrowest test of discretionary is "basic policy decision," and the decision to issue (or not to issue) a warning almost certainly so classified. Beyond that, any important governmental action undertaken by the Governor, the highest ranking officer in state government, is almost ipso facto "discretionary." (The dictum in a Johnson footnote suggests one caveat to this evaluation: to invoke the immunity the state may be required to show that the Governor did in fact consider the possible adverse consequences of his decision to warn (or not to warn).)

If we jiggle the facts, however, the outcome of the "discretionary" test becomes less certain. What if the plaintiff does not challenge the Governor's decision per se, but rather alleges negligence on the part of regular state employees in the prior process of information gathering and evaluating? The Johnson opinion might suggest that this is low-level negligence not protected by the discretionary immunity. (As noted above, the new § 955.1 finesses this issue.) Does, however, the "discretionary" quality of the decision somehow "reach back" to immunize any ordinary negligence which preceded and led up to the decision? A letter from the California Deputy Attorney General to the Emergency Preparedness Projects Office, dated November 29, 1977, suggests that many courts would allow the immunity to "reach back" in this fashion. While the letter does not document its suggestion with citations, as a prediction of judicial behavior its claim is not implausible.

Of course, to the extent that the process of earthquake prediction is undertaken by the federal government rather than by state and local governments, the state would be relieved of the responsibilities that might entail liability implications. According to the Attorney General's letter, most of the burden of gathering earthquake information and determining whether an earthquake prediction is appropriate presently rests with the United States Geological Survey. If the prediction is both made and rendered public by the USGS, state and local governments would be free of possible liability. (Of course, insofar as the function of information gathering is undertaken by the federal government, there are possibilities of tort suits against the federal government. The federal negligence in gathering information could easily be regarded as the "proximate cause" of the earthquake prediction which the state, provided with this information, may choose to publicize.)

On the "discretionary" issue, the Court of Appeal's Connelly decision again is worthy of mention. On the Connelly facts, the Court of Appeal rejected not only a "misrepresentation" claim, but a "discretionary" claim as well. The Court concluded that while the decision to undertake a river forecast program is clearly "discretionary," negligence in the preparation of a particular forecast is operational and hence not immune. Of course, river warnings can be distinguished from earthquake warnings, since the former are a day-to-day routine while the latter are truly exceptional--in terms both of their infrequency and of the high-level decision-making process that leads up to them. Therefore, Connelly seems of no more than limited relevance in the earthquake context.

The above evaluation has essentially dealt with California law. I have found no major cases in the federal, New York, or Washington reports that are worthy of mention--apart from those federal cases which have clustered around the "misrepresentation" issue. The Washington Supreme Court's statement in Creelman, supra. that public officials' public statements enjoy an "absolute privilege" seems limited to Creelman's defamation context. On Washington law, see also the MacPherson case, discussed just below.

E. "Affirmative Duty" in a "Failure to Warn" Case.

Connelly deals with harm caused to an individual because of a mistaken forecast. When and if a tort claim complains about the state's failure to give a warning about some impending natural event, the "discretionary" issue remains alive, and the issue of "affirmative duty" becomes inescapable. As noted, the general tort rule is that while parties may not engage in harm that negligently causes harm to others, they are not obliged to participate in conduct that will protect others from harm that would result from other sources, including the natural environment.

There are, however, as noted, a number of important exceptions to the rule of no affirmative obligations. Two are dealt with in Brown v. MacPherson's, Inc. (86 Wash. 2d 293, 545 P.2d 13 (1975)), a case concerning an impending natural disaster. The disaster was an avalanche in Stevens Pass in 1971. The plaintiffs were local residents who suffered loss of life and property because of the avalanche. The defendant state agency was the real estate division of the State Department of Motor Vehicles. Dr. LaShapelle, a University of Washington avalanche expert, warned the state agency of the possibility of avalanches in the Stevens Pass area. An agency representative promised to convey this warning to the local residents. Relying on the agent's promise, LaShappell refrained from taking direct action to give the local residents an appropriate warning. In fact, not only did the agent fail to comply with his promise, but in communications with the local developer (Mr. MacPherson), the agent specifically indicated that there was no avalanche danger.

The Washington Supreme Court imposed liability on each of the two branches of the undertaking theory. One was the "reliance" branch. Doctor LaShappell declined to warn the appellants himself only because of the agent's promise that he would provide this warning. Given the reliance on the agent's undertaking, the state could be held liable for its inaction. (See the "reliance" rationale in Indian Towing). Secondly, the State not only failed to comply with its promise, but in undertaking to communicate with the developer, MacPherson, it negligently understated the true danger, thereby persuading MacPherson to refrain from taking action that he might otherwise have taken to protect the local residents. This, the court held, was negligence in the performance of an undertaking, increasing the risk of harm to local residents, for which the state could be held liable. Brown

was a 5-4 decision. However, the dissenting opinion states that it does "not dispute the majority's analysis regarding the liability of one who undertakes to render aid, but who then executes the rescue or warning in a negligent manner." The dissenters' only objection was that the agent, in making his promise, had acted outside of the scope of his employment, and therefore that the rule of vicarious liability could not be relied on to impose liability upon the state.

On its special facts, therefore, the MacPherson Court was able to find an "affirmative duty." These special facts would be absent if a public entity failed, in 1974, to release an earthquake warning which it arguably should have released. To bring an earthquake case within the Restatement-MacPherson rule, the public entity would need to do one of the following:

(a) Adopt an earthquake-prediction program, and publicize that program so widely that the citizenry comes to rely on the program in significant ways as providing them with the earthquake protection they need.

(b) Not only fail to warn of an impending earthquake, but actually provide advice that an earthquake is not forthcoming, thereby inducing people to abstain from precautions which they would otherwise undertake.

In the event of (a) or (b), a court might be willing to find an "affirmative duty." Perhaps, however, (a) would not be enough, since many courts are uneasy about recognizing an affirmative duty when members of the public merely rely, in a general and probably no more than implicit way, on the protective features of an ongoing governmental program. See the building inspection cases, discussed below.

III. LIABILITY FOR HARM CAUSED BY THE COLLAPSE DURING AN EARTHQUAKE OF A PRIVATE BUILDING

Precis:

In a jurisdiction that follows the traditional rules on governmental immunity, a public entity would be categorically immune for any negligence concerning license or permit issuance for negligent inspections, since the entire inspection/permit-issuance process would be deemed a governmental function.

New York law contains the largest set of cases on the public-regulation-of-private-building tort liability issue. The general rule in New York is that there is no liability on the part of the local public entity for its failure to enforce local building regulations. This immunity rule seems at first to apply regardless of whether the negligence lies in the failure to inspect in the first place, the failure to detect an illegal condition in the course of an inspection, or the failure to follow-up once an inspection has detected a legal violation. There are, however, cases establishing important exceptions to New York's general rule. The public entity can be liable if its agent (in some way or another) becomes actively involved in the process by which persons are subjected to building risks. And some New York cases suggest that when an inspection has been successful in uncovering a violation of law, and when the public entity furthermore has real knowledge of the particular individuals whom that violation subjects to danger, liability can be recognized.

Outside of New York, the case law is in disarray. Alaska is the jurisdiction whose judiciary is most strongly in favor of liability. Even in Alaska, however, the courts have limited liability to cases of negligently conducted inspections and a negligent failure to follow-up; a negligent failure to inspect in the first place has (somewhat surprisingly) been deemed "discretionary" and hence immune by the Alaska Supreme Court. In any event, the Alaska legislature, reacting to the judicial decisions, has granted local governments (but not the state) an immunity for any negligence in either inspection or subsequent hazard abatement.

As against the Alaskan judicial precedent, there is a collection of decisions from sun-belt jurisdictions--Florida, Louisiana, and Arizona--which categorically deny public-entity liability in the building-code-enforcement area. The Supreme Court of Washington has been sympathetic to liability, but somewhat ambivalently. After adopting what seemed to be a general pro-liability rule, it has receded from that rule somewhat, and adopted an intermediate rule pursuant to which liability depends on what the Court perceives to be the logic of the particular regulatory program.

California law is greatly complicated by a number of ambiguities in the California statute. If a public entity negligently issues a building permit in the first place ("negligently" because the building's plans do not conform to the building code's requirements for earthquake safety) the public entity

would apparently be liable, notwithstanding the permit immunity in the California Act. This immunity has been limited by the California Supreme Court in Morris v. County of Marin. Under Morris, only if the issuance of the permit is "discretionary" does the immunity apply; and whatever "discretionary" means in this context, when the building's plan evidences a clear violation of the building code, the obligation to refuse the permit rules out "discretion." Of course, one can imagine "gray areas" in which the public entity decision-maker "could go either way" in assessing the compliance of the plans with the building code. In such cases, it is possible that the Court would conclude that "discretion" exists, and that the rule of immunity therefore applies.

Once a building permit is issued and building activity ensues, what happens if the eventual structure does not conform to the original plans and therefore falls short of building code norms? This noncompliance would ordinarily be detected in the building inspection which precedes the locality's issuance of a certificate of occupancy. Under Morris v. County of Marin, the certificate immunity has been narrowed, but the inspection immunity remains absolute. In these circumstances it is an open question as to whether immunity would exist if a certificate is improperly issued because of incorrect information provided by a negligently conducted inspection.

Regulations issued under the Alquist-Priolo Act seemingly impose a "mandatory duty" on local governments to refuse to issue permits or certificates to buildings when a building is within 50 feet of a designated active fault. However, this duty is to some extent "rebuttable," and in its application to single-family houses which are not part of a residential development, the regulations may illegally exceed the Act.

A. Introduction.

Not surprisingly, there are no earthquake cases in the law books. There is, however, a significant lode of case law on the liability of public entities for harm caused by buildings in violation of fire or other safety provisions contained in state or local building codes or regulations. These cases are collected below. The emphasis is on the law of California, Washington, New York, and the federal government. However, a limited number of leading cases in other jurisdictions are also dealt with. The liability claims break down into several sorts: the public entity's negligent failure to conduct a building inspection; the public entity's negligent execution of an actual inspection resulting in the inspection's failure to discover the unsafe legal violation; the public entity's negligent failure to enforce compliance with the law once knowledge of a violation is obtained (this is one instance of the negligent failure to "enforce the law"); and the public entity's negligent issuance of a building permit (or some other comparable approval).

It is of course true that were there no building codes or regulations, private parties would be free to construct and operate buildings just as they please. The legal issues in this section therefore contain an inevitable element of the "affirmative duty" problem. However, public control of building safety is so pervasive and so taken-for-granted that the "affirmative duty" issue is capable of being overlooked. We tend to think of the issuance of a building

permit as essentially "releasing" a building for occupancy, rather than as merely declining to prohibit it from opening. Given the intangibles of the situation, it is not surprising that the case law reaches no consensus on the "duty" issue.

In describing the cases, an effort is made to identify what the building-code-type violation was, and what public-law obligation the public entity departed from. Since the case law is exceedingly diffuse, and since the various judicial holdings often seem inspired by the case's particular facts, it is necessary to set forth the facts and the reasoning of the cases one by one. Given the variety of the cases' factual circumstances, it is well to make clear at the start the kind of facts that could support an after-the-earthquake tort claim. There are city (or state) laws that govern building construction. Such laws are typically called "building codes." Other laws govern a building's operation and maintenance. These laws are typically known as "building regulations." Earthquake-safety provisions are almost always part of the "construction" code, rather than of the "operating" regulations. Once a building's construction has been approved pursuant to the construction standards, it is legally irrelevant that those standards are rendered tougher or more rigorous in later years; construction approval is a once-and-for-all proposition.[1] At least this is true under typical state and city law; and one cannot imagine such a legal arrangement being challenged in court on any plausible tort-law grounds. As for construction standards, they are typically enforced, at the building's inception, in a two-step process. The building's plans are submitted for approval prior to the beginning of construction; if the plans meet the construction standards, a building permit is issued. As and after the building is constructed, it is inspected by city officers; if its actual construction then is deemed to satisfy the standards, a certificate of occupancy is issued.

B. The Traditional Rule.

The traditional rule of government liability, as applied to problems of negligent inspection, is nicely illustrated by the Maryland case of E. Eyring & Sons Co. v. City of Baltimore, (253 Md. 380, 252 A.2d 824 (1969)), Maryland being one of those states that have not yet abandoned the traditional immunity rule. In the Baltimore case, the roof of a Catholic church collapsed on an assemblage of persons gathered for a Lenten Mass. The plaintiff's allegation against the city concerned its "failure to see that the building was safely and adequately designed and its failure to properly inspect and supervise its construction to insure compliance with the applicable provisions of the building code." On grounds of immunity, the Maryland Court of Appeals rejected the lawsuits. While cities are liable for torts committed in pursuit of a proprietary function, the Court reasoned, they are immune for torts relating to a "governmental function." Legal enforcement of the building code is sanctioned by state statutes; it is operated at a deficit; and it is intended to protect the safety and health of the local public generally. All of the standard indicators thus pointed the Court in the direction of finding such enforcement to be a "governmental function."

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[1] The City of Los Angeles is now considering an ordinance that would "retroactively" require that certain older (pre-1933) private buildings strengthen themselves against the earthquake risk.

C. New York.

New York law contains a surprising number of cases dealing with municipal liability for improper inspections or the improper grant or revocation of building permits. Those cases decided, at least in form, by the New York Court of Appeals (the state's highest court) are discussed first. Lower court New York opinions are discussed thereafter.

Runkel v. City of New York involved an abandoned multiple-family dwelling bordering on a city street, which collapsed to the ground floor, seriously injuring infant plaintiffs, who were playing in the building at the time of its collapse. The building was in "imminent danger of collapse," and had been in this condition for quite a while. Fifty days before the collapse, a city building inspector had examined the building, noted its danger, and recommended demolition. The next day, the superintendent of buildings posted a notice directing the owner to secure the building or demolish it. After that, however, both the owners and the city "remained dormant." This is, then, a case of the city's improper failure to enforce the law subsequent to an inspection which itself was proper. As the Appellant Division read both the city code and the state's multiple-dwelling law, the city was under a "mandatory duty" to abate the dangerous condition, which classified as a "nuisance." (A later opinion, in distinguishing Runkle, notes that an explicit provision in the state multiple-dwelling law referred to by Runkel seemingly creates a private cause of action against the city for improper failure to enforce the law. See Stranger v. New York Electric & Gas Corp., infra).

In Runkel, the Appellate Division imposed liability on the city. 282 App. Div. 173, 123 N.Y.S.2d 485 (1953). It explicitly rejected any distinction between "misfeasance or non-feasance--conduct or omission." According to the court, the state's surrender (of sovereign immunity) is broad, general, and unqualified." The Court noted, however, that for public entities, just as for private entities, "a fundamental prerequisite to liability" involves the issue of "duty." Having said this, however, the Court did not greatly elaborate on the "duty" issue.

After the Appellate Division's ruling, the case was remanded for trial. Plaintiffs secured a verdict against the city. 138 N.Y.S.2d 422. The Appellate Division affirmed. 286 App. Div. 1101, 145 N.Y.S.2d 729 (1955). However, it also ruled that in light of the dwelling owner's "primary" negligence, the city was entitled to reimbursement for the cost of the plaintiff's judgement.[1] On appeal, the New York Court of Appeals affirmed this affirmance in a per curiam fashion--thereby implicitly endorsing the result reached by the Appellate Division the first time around. One judge on the Court of Appeals dissented, unwilling to impose liability on public entities for mere omissions.

In Rottkamp v. Young, a town building inspector refused to issue a building permit for zoning-oriented reasons. His reasons were apparently incorrect as a matter of law; yet even after a court ordered that the permit be issued forthwith, the building inspector refused to comply. Eventually, the city amended

[1]Obviously, this reimbursement right can be of major importance. None of the building-code cases dispute the existence of this right.

its zoning ordinance in a way that prevented the plaintiffs from securing their building permit thereafter. They sued the building inspector and the town for the improper failure to issue the permit in the first place (or at least in the second place, after the original court decision).

As for the public official, the court indicated that while there is liability for "ministerial" acts, there is immunity for acts which are "judicial" or "discretionary." Since the building inspector's refusal to issue the permit "necessarily involved the construction of the zoning ordinance and a consideration of the facts before him," the Court regarded that determination as "discretionary" and hence immune.

The Court then indicated that "the liability of the defendant town must be judged by different standards." But the standards turned out to be not that different after all. Despite the waiver of sovereign immunity, "there still remain some areas of governmental action which cannot be questioned for reasons of policy" in a tort suit. "The granting or withholding of a building permit is an exercise of sovereign power, for which no liability should fall upon the municipality." The "policy considerations which dictate the protection of the public officer from reprisal . . . also dictate the same protection from the municipality whose interests are served by the acts of the officer."

The opinion described above is that of the Supreme Court, Appellate Division. 21 A.D.2d 373, 249 N.Y.S.2d 330 (1964). Two judges dissented, on grounds of the willful unlawfulness of the defendant's refusal to honor the original court order. The Court of Appeals affirmed the Appellate Division's opinion in a terse per curiam, thereby endorsing the Appellate Division's result, if not the reasoning. 15 N.Y.2d 831, 205 N.E.2d 866, 257 N.Y.S.2d 944 (1965). At the Court of Appeals level there was a dissenting opinion, which would have found liability because of the defendant's "malice." This dissent pointed out that "malice" is an important factor in the governmental immunity law of all but a very few states--of which California happens to be one.

Motyka v. City of Amsterdam is the first full opinion on the negligent inspection/ license range of issues by the New York Court of Appeals. 15 N.Y.2d 134, 204 N.E.2d 635, 256 N.Y.S.2d 595 (1965). In Motyka a building fire burned down a multiple-family residence. The fire was apparently caused by a defective heater in an oil heating stove installed by a tenant. After an earlier fire, a city Fire Department Captain warned the tenant to discontinue using the heater until it was repaired. But no report was made to the Commissioner of Public Safety, the landlord was not notified of the Captain's order to the tenant, and the city took no further action. The defective stove evidently violated the state's multiple-dwelling residence law. While the matter is unclear, it appears as though the Fire Department official's failure to give appropriate notification to the landlord was a violation of a state statute.

On these facts, the Court of Appeals ruled that the plaintiffs did not have a cause of action. While sovereign immunity has been abandoned, "just as it is necessary to sustain an action against an individual . . . to ascertain whether

it is under a duty to the plaintiff, so, also, it is necessary to decide whether a city . . . is under a duty to the plaintiff irrespective of sovereign immunity." Moreover, "the rule is that, independent of sovereign immunity, a municipality is not liable for failure to supply general police or fire protection." Municipal tort liability exists only "where there has been some relationship on the part of the defendant to the plaintiff creating a duty to use due care for the benefit of particular persons or classes of persons." The Runkle case "involved different facts and different statutes."

Judge Desmond dissented. "Any court-created-immunity rule should be forthrightly abandoned when its injustice and its unreality are so evident as to produce exception, interpretations and inconsistencies galore. The time has come to remove from our law all the remaining vestiges of governmental immunity."

Smullon v. City of New York (28 N.Y.2d 66,268 N.E.2d 763, 320 N.Y.S.2d 19 (1971)) involved a sewer trench which violated city ordinances and code provisions concerning the required bracing and shoring. The city inspector, in an apparently negligent way, failed to perceive these legal violations. Under the city's code, the inspector evidently had the "power" (but apparently not the obligation) to halt work in circumstances involving codal violations. At the time of the accident, the supervisor was not at the job site and the city sewer construction inspector was. As the victim decended into the trench, the inspector said, "it is pretty solid there" and "I don't think it needs to be shored." The employee was then killed when the trench walls collapsed.

The Court of Appeals imposed liability, concluding that the facts were closer to Runkle then they were to Motyka. Given these facts, the Court concluded, there was a "special duty" or "relationship." What triggers liability is "the inspector's positive action in assuming direction and control over the employee's descent into the trench." The Court explicitly left open whether liability could be founded on the "mere presence of the inspector and his failure to prevent (the victim) from entering the trench." Two judges dissented, finding that the Court's language on "direction and control" was a vast overstatement of the cases facts.

Stranger v. New York State Electric & Gas Corp. (25 A.D.2d 169, 268 N.Y.S.2d 214 (1966)) is the first of the New York lower court decisions meriting discussion. In Stranger, a fire was caused by an unvented open-flame gas heater which was in violation of the city's building code and housing code. The city building inspector notified the property owner four years before the fire that a danger existed and directed the property owner to remove the danger, threatening that the city would demolish the building if the owner failed to comply. The owner did so fail, and the city proceeded to do nothing. (It is unclear whether the city was under any legal obligation to take action. (The Appellate Division denied recovery, ruling that the case could not be distinguished from Motyka, and the Motyka had seemingly limited Runkle to its peculiar facts.

In Whitney v. City of New York (27 A.D.2d 528, 275 N.Y.S.2d 783 (1966)), a boiler exploded in the basement of a building. The city's negligence was in failing to inspect the boiler at all; this inspection was apparently required by the city's administrative code. The Court found Motyka applicable and denied recovery. "We conclude that the sections of the Administrative Code providing for boiler inspections by the city do not create a duty running to an individual, but rather are for the benefit of the common good."

In Sherman Williams Co. v. City of Port Jervis (48 A.D.2d 711, 368 N.Y.S.2d 45 (1975)), a building collapsed in circumstances indicating the city's "failure to enforce certain provisions of the city code." Relying on Whitney, the Court denied recovery. However, the Court suggested, citing Smullon, that the result might be different in situations "involving (the city's) knowledge and foreseeability of a dangerous condition."

In DiPippi v. City of Port Jervis (56 A.D.2d 589, 391 N.Y.S.2d 645 (1977)), plaintiffs were injured when an adjacent building collapsed. The nature of the city's legal violation is not made clear. The Court denied recovery, on grounds that "the circumstances do not show a special duty between the city . . . or its building officials . . . to the plaintiffs."

In Ascrizzi v. Kaufman (57 A.D.2d 643, 393 N.Y.S.2d 216 (1977)), a negligent city inspection failed to detect that a building's construction was badly done and was not in compliance with relevant state and local law. A certificate of occupancy was consequently issued for the building. The plaintiffs, who later bought the building, suffered economic injury when its substandard condition became apparent. The Appellate Division found no liability on the part of either the two supervisors or the town itself. When "a municipality acts in a governmental capacity for the protection of the general public, it will not be liable for a failure to furnish effective protection to a particular individual to whom it owes no special duty." For this idea, the Court relied on Motyka.

In Gannon Personnel Agency, Inc. v. City of New York (57 A.D.2d 528, 394 N.Y.S. 2d 5 (1977)), forty-three persons were injured as a result of a gas explosion in a building. The building contained two instances of "improper plumbing;" an uncapped two-inch header pipe, and piping which was lacking a safety cut-off valve. The absence of the safety valve was in violation of the city's code. A city building inspector had visited the construction site, and the evidence supported the idea that he had actual knowledge of the relevant danger. Nevertheless, he issued a "blue card" which allowed the gas to be turned on. Citing Smullon and Runkle, and focusing on the city's "actual knowledge" of the potential danger, the Court affirmed liability.

Van Buskirk v. State (38 A.D.2d 349, 329 N.Y.S.2d 381 (1972)), involved the state, rather than a local government. A state agency issued a permit to a dam. Its alleged negligence was in failing to adequately investigate the harm to other riparian owners. In issuing the permit, however, the state evidently violated no statute or regulation; it merely acted unintelligently. In these circumstances, liability was denied, on grounds that the permit-issuing process is "a governmental function of a quasi-judicial nature."

D. Other States.

1. Alaska.

In Adams v. State (555 P.2d 235 (1976)), a hotel fire killed many hotel guests. The fire was caused by "hazardous conditions" which apparently were in violation of state law. The hotel had been inspected eight months before the fire

by state fire marshals, who did in fact detect the hazardous conditions which apparently were in violation of state law. The hotel had been inspected eight months before the fire by state fire marshals, who did in fact detect the hazardous conditions. They failed, however, to write the hotel manager a letter explaining these violations. After the inspection, the inspector sent a telegram to his supervisor describing the building as entailing an "extreme life hazard" and asking the supervisor to come to the location as soon as possible. In fact, however, the state took no further action prior to the fire. State statutes and regulations imposed obligations to conduct inspections, and likewise an obligation to "order the dangerous conditions . . . removed or remedied in such manner as may be specified by the state fire marshall." More specifically, the regulations required the posting of a notice that the unsafe building should not be entered.

The Alaskan Supreme Court was able to overcome the "affirmative duty" problem by relying on the "undertaking" doctrine. But the Court, in truth, applied that doctrine in a very relaxed way, making no finding that the aborted undertaking had either increased the risk of harm or had engendered reliance (as the Restatement would require). Apparently, any undertaking which is cut short in an unreasonable way is enough to justify liability, as against the affirmative duty objection. For confirmation of this, see Adams' companion case, State v. Jennings, 555 P.2d 248 (Alaska 1976).

The Court also rejected the "public duty" doctrine developed in other jurisdictions. The Alaska Supreme Court, professing to rely on the "undertaking" doctrine, found an actionable duty running against the state. "In undertaking to inspect and advise on the conditions in the (hotel), the state undertook a duty to those injured by the burning of the hotel, not to the public in general. . . . We consider that the 'duty to all, duty to no one' doctrine is in reality a form of sovereign immunity which is a matter dealt with by statute in Alaska, and not to be amplified by court-created doctrine." The Court also found the state's "discretionary" immunity inapplicable, given the "operational" or "ministerial" character of the actual inspection. Also, in strong dictum, the Court, while noting that Adams itself is a negligent follow-up case, indicated that the state would be equally liable for "a negligent failure to discover fire hazards." This dictum clearly covers the case of an inspection which is conducted-in-fact but which negligently fails to uncover an illegal hazard. It is unclear whether the dictum is meant to cover a public entity's negligent failure to inspect in the first place. Indeed, in discussing the "discretionary" immunity later in its opinion, the Court suggested that the decision to inspect the hotel "could be described" as discretionary.

The Court's opinion makes clear that for the state to be liable not only must a "duty" exist, but there must be a negligent or unreasonable failure to comply with the duty. On the Adams facts, the Court was certain enough that the state's complete inaction was in fact "unreasonable." The Court found its extremely unlikely that a public entity would terminate an inspection program because of its fear of tort liability in negligently conducting that program. "The cost of fire prevention, including the risk of liability described above, is still less than the cost of the state of disastrous fires, in terms of firefighting effort, lost taxes, and the impact on the economy."

So spoke the Court. The repercussions were dramatic. According to Gerald Sharp, Juneau City Attorney, state and local governments reacted to Adams and Jennings by sharply cutting down on their fire inspection activities (so as to minimize their liability exposure). These governments also petitioned the Alaska legislature for relief. The legislature in turn amended the local government liability statute by creating a new immunity for any negligence in inspecting property or failing to "abate" any health hazard. § 09.67.070 (d)(1). This amendment relieves local governments of their Adams-Jennings liability burden--although the language of "abate" is a bit nebulous. The legislature refused, however, to amend the state-government liability statute. The state, therefore, faces continuing Adams exposure--and, as a result, is continuing to hold to a minimum its building inspection activities.

2. Arizona.

In Duran v. City of Tucson (20 Ariz. App. 22, 509 P.2d 1059 (1973)), the victim's place of employment was in violation of the city's fire prevention code, by virtue of an open-flame heater. That code imposed a legal duty on city officials to inspect private property, and gave them the authority to order the removal of dangerous conditions. The city's alleged negligence lay partly in its negligent failure to detect dangers in the course of an inspection, and also in its negligent failure to take appropriate action with respect to dangers actually perceived. The employee, injured in a fire, sued the city. Recovery was denied by an intermediate Arizona court. "Abrogation of the doctrine of governmental immunity removes the defense of immunity, but does not create any new liability for a municipality." To recover, a plaintiff "must show the breach of a duty owed to him as an individual and not merely the breach of an obligation owed to the general public." Here, "the alleged negligence is predicated on an act which the ordinary citizen would not be called upon to perform." The public entity has done nothing to convert a general obligation owed to the public into "a special duty to an individual for the breach of which it is answerable in damages." The city's negligence is of an omissive sort. The Restatement's provisions on the "undertaking" doctrine are of interest but they are not technically relevant, since here there has been no rendering of services by the defendant to the plaintiff. "The inspections mandated by the fire code are not a service to the owner or occupier of the premises." Motyka is the relevant authority for purposes of denying liability.

3. Florida.

In Modlin v. City of Miami Beach (201 So. 2d 70 (1967)), a shopper was killed when the mezzanine collapsed in a retail store in which she was shopping. Five years previous, the building had been inspected; negligence in the inspection resulted in the city's failure to detect the building defect. Presumably, this defect was in violation of the city's housing code--although the Court's opinion does not make this clear. The Florida Supreme Court denied liability. It left open whether an immunity exists under Florida law for "discretionary acts;" evidently, the issue had not yet been litigated in Florida. While recognizing an immunity for "quasi-legislative" or "quasi-judicial" acts, the Court deemed neither of those immunities applicable; the building inspector's conduct was of an "executive" rather than a "quasi-judicial" nature. No doctrine of governmental immunity therefore applies. However, "it is a well-recognized principle of tort law that a fundamental element of actionable negligence is the existence

of a duty owed by the person charged with negligence to the person injured." This duty must "be something more than the duty that a public officer owes to the public generally." Since the Modlin facts are in no way special, the city inspector is not personally liable, and the city itself is therefore not liable under any vicarious liability theory. "Public policy" supports the no-liability result; and that result is not inconsistent with prior cases, which basically had imposed liability when the city's negligence causes harm, rather than when the city's omission fails to prevent harm.

4. Louisiana.

In Dufrene v. Guarino (343 So. 2d 1097 (1977)) a fire in the Upstairs Lounge in New Orleans was caused by hazardous conditions evidently in violation of the city's fire code which the city did not know of because public officials had failed to make inspections which were in fact required by law. An intermediate Louisiana court denied recovery. "Now, with sovereign immunity a thing of the past, it is important to precisely define the limit of the state's tort liability. The duty to inspect the upstairs lounge by any of these (public) agencies is imposed to protect the public generally against potential hazards." There was no duty owed individually to all future patrons of the bar. Were liability imposed, local governments might repeal building code ordinances and ordinances requiring inspections.

5. Wisconsin.

Coffey v. City of Milwaukee (74 Wis. 2d 526, 247 N.W.2d 132 (1976)) is a lark of a case. Here, it was alleged that Milwaukee inspectors negligently failed to detect a fire code violation in the course of an actual inspection of a building. As a result, the building burned down, greatly reducing the economic value of the plaintiff's tenancy in the building. The plaintiff then sued the city. The opinion of the Supreme Court of Wisconsin seemingly rules for the plaintiff paragraph by paragraph. While the opinion concedes that the issuance of building permits may well be "quasi-judicial" and hence immune, it determines that the inspection process is neither "quasi-judicial" nor "discretionary;" inspections are mandated by state statute, and the determination of violations is a cut-and-dried procedure. The opinion then rejects the no-liability "duty" analysis in the Modlin and Duran cases from Florida and Arizona in favor of an obviously pro-plaintiff "duty" doctrine which hinges mainly on "foreseeability."

But then, having affirmed all the usual elements of an actionable tort, the Court turns around. For there remains, its opinion indicates, the residual issue of "public policy," which can wipe out an otherwise valid tort claim. The relevant factors of "public policy" are as follows:

> (1) the injury is too remote from the negligence; or (2) the injury is too wholly out of proportion to the culpability of the negligent tort-feasor; or (3) in retrospect it appears too highly extraordinary that the negligence should have brought about the harm; or (4) because allowance of recovery would place too unreasonable a burden on the negligent tort-feasor; or (5) because allowance of recovery would be too likely to open the way for fraudulent claims; or (6) allowance of recovery would enter a field that has no sensible or just stopping point.

(Other courts would regard these factors as relevant to the "duty" issue.) How do these factors work in a case like Coffey? The Court's opinion confesses that it has no idea. The Court therefore remands the case for a full trial in order to develop the facts that will enable the Court at some later time to make up its mind on the "public policy" issue.

E. Washington.

Washington law--all of it recent--begins with Nerbun v. State (8 Wash. App. 370, 506 P.2d 873 (1973)) and Loger v. Washington Timber Products, Inc. (8 Wash. App. 921, 509 P.2d 1009 (1973)), both of which concern job-site inspections. In Nerbun a worker was killed while engaged in dismantling activity which seemed to violate state regulations. A wrongful death suit was brought against the state, alleging the state's neglect in failing to conduct an inspection that could have discovered the dangerous activity to which the employee had been assigned. (The danger had arisen subsequent to a state inspection conducted 30 days previously.) A state statute placed on the Department of Labor a "duty" to have inspections conducted. The state Court of Appeals denied recovery, finding that this statutory "duty" was adequately complied with by "spot check inspections" designed to assure employers' "reasonable compliance" with the law. Basically, the Court's holding was that the particular failure to inspect was not really negligent or illegal.

In Loger, no inspection had been conducted for over a year; as an alleged result, dangerous employment conditions which injured the plaintiff were not detected. The Court of Appeals conceded that the statutes indeed impose a "duty" to inspect on the state Department but read the statutes as refusing to recognize a private cause of action for violation of that duty. In denying recovery, the Court further suggested that the failure to inspect was "discretionary."

In Campbell v. City of Bellevue (85 Wash.2d 1, 530 P2d 234 (1975)), a landowner's property was adjacent to a creek; the bareness of wires in his outdoor lighting violated the city's electric code. A city electrical inspector visited the location. His inspection was not as thorough as it should have been. Nevertheless, he observed clear dangers constituting a threat to life. Under the city's building code, a building official "shall immediately sever" any unlawful electric insulation and, if the owner refuses to do so himself, "shall disconnect" dangerous electric facilities. In Campbell, after giving the landowner notice, the fire inspector took no further action. Later, a neighbor slipped into the creek and received a paralyzing electrical shock--as did his mother in attempting to rescue him. The Washington Supreme Court imposed liability, citing the New York cases of Runkle and Smullen (discussed above). According to the Court, the key facts in Campbell were that the city inspector had actual knowledge of the extreme danger and violated the code in not taking steps to eliminate it. On what the New York courts would call the "duty" issue, the Court stated that "these requirements were not only designed for the protection of the general public but more particularly for the benefit of those persons or class of persons residing within the ambit of the danger involved, a category into which the plaintiff and his neighbors really fall."

The Court examined a relevant provision of the city code and determined that, properly interpreted, the code provision did not mean to preclude municipal liability. By implication, the Court's opinion therefore suggests that an appropriate provision in a city code can be effective in precluding liability. The Supreme Court distinguished the Court of Appeals' ruling in Nerbun and Loger on the grounds (1) that those cases involved at best a mere negligent failure to inspect, rather than a negligent failure to take appropriate action respecting known and serious dangers, (2) that the city's code dictated remedial action in a way that the state's labor statutes did not, and (3) that the state statute involved in Nerbun and Loger did not intend to impose liability upon the states.

In Georges v. Tudor 16 Wash. App. 407, 556 P.2d 564 (1976)), the purchaser of a building which collapsed after his purchase thereof sued the city, alleging its negligence in conducting inspections and in issuing a building permit. A Court of Appeals denied liability, on grounds of no "duty." The Court distinguished Campbell on the idea that the Campbell facts had established a "special relationship" between the victim and the city which overcame the "duty" obstacle.

The most recent major ruling from the Washington Supreme Court is Halvorson v. Dahl. 89 Wash.2d 673, 574 P.2d 1190 (1978). Here the negligence of the City of Seattle lay in its failure to take appropriate action after city officials had detected, through an inspection, a building code violation. The Court's opinion refers first to the "traditional rule" that there is no liability in such a case, since the obligation runs to the public only (citing, inter alia, Georges, and the Arizona case of Duran v. Tucson, discussed above). The opinion then alludes to the "emerging new rule" in favor of liability, citing the Alaska and Wisconsin cases discussed above. But the opinion professes to find it unnecessary to choose between these two rules. For even the "traditional rule" allows for liability if the building code "by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons." The opinion then studies the Seattle Building Code, and finds language in the Code suggesting that the Code was specifically intended to benefit the "occupants" of those buildings covered by the Code and not merely the public in a general way.

Amazingly, the Halvorson opinion nowhere cites the Supreme Court's opinion in Campbell. It is therefore uncertain what continuing significance Campbell carries.

One of the most bizarre of all the permit cases is another recent decision of the Washington Supreme Court, Haslund v. City of Seattle imposing liability, in strange facts, for negligence in issuing a building permit. In Haslund (86 Wash. 2d. 607, 547 P.2d 1221 (1977)), the city illegally issued a building permit to the plaintiffs ("illegally" in the sense that it was issued in violation of the city building code).

On grounds of this illegality, a court later invalidated the permit. When the plaintiff then filed for a new and proper permit, it found that the zoning ordinances had been amended in a way that now precluded the issuance of a permit. In the meantime, the plaintiffs had invested great sums of money in the building project. A jury verdict entered in their favor for almost $3,000,000 was affirmed by the unanimous Washington Supreme Court. The plaintiffs successfully claimed that the negligent issuance of the original permit was the "proxi-

mate cause" of their harm. The Court rejected the city's argument that the issuance of the permit was "discretionary" and hence immune: the city's issuance of a building permit "meets none of the criteria for the discretionary function exception. In this particular case, questions of policy and discretion were settled at the time the ordinances composing the code were adopted. . . ." No showing had been made that a "policy decision, consciously balancing risks and advantages, took place in the issuance of the building permit."

In a footnote, however, the Court noted that, immunity apart, the existence of a liability-producing tort was far from clear. Plaintiffs had relied at trial on two tort theories. One was negligence per se--i.e., that the city's violation of law in issuing the original permit was itself actionable negligence. The plaintiff's second theory was one sounding in ordinary common-law negligence. The Supreme Court suggested, in discussing the plaintiff's negligence per se theory, that its application was doubtful, since the zoning ordinances were not designed to protect applicants against the erroneous granting of permits. And the Court suggested that the common-law negligence argument needed to demonstrate "the existence of a duty owed to the complaining party. But having noted the doubtfulness of the plaintiff's liability claim, the Court then indicated that these doubts were irrelevant to its decision, in light of the fact that the city had failed to present to the trial court these arguments against liability.

F. Review of New York, Washington, and Other State Decisions.

The New York cases lean toward no liability, but with a few pro-liability exceptions. The Washington cases lean in favor of liability, with lower-court anti-liability decisions. The Alaska case strongly favors liability; the cases in Arizona, Florida, and Louisiana strongly oppose liability. The Wisconsin case is almost whimsically ambivalent. The distinctions drawn among the New York cases, and among the Washington cases, are not especially persuasive. And none of the cases in the other states are strongly reasoned. Any building safety law, from one perspective, seeks to protect those people who occupy particular buildings. Buildings can perhaps be distinguished in terms of how many people are typically within the building at a given time (the larger the number, the more foreboding the prospect of liability), and how "stable" the building's occupancy is. (A residence has particular, identifiable occupants; the occupancy of some public buildings is in constant flux. Such a flux adds to the indeterminancy that would be involved in imposing liability.)

There is little prospect of liability unless a building is in violation of a safety law (compare the denial of the permit in the New York Van Buskirk case) and unless the public entity has violated state or local law in failing to detect or take action against the building hazard. There is a greater tendency to impose liability once public officials have actually learned of, and then negligently ignored, a building hazard, than in cases in which the only public-entity negligence lies in failing to discover hazards. (This is, however, far from a firm rule.) That courts should respond differently in the two classes of cases is not surprising. Knowledge of the hazard renders the danger specific as to place and nature and particular as to persons threatened. In negligent failure-to-inspect cases, by contrast, the danger, from the public entity's point of view, is purely hypothetical. Also, advertent failure to take action

against a known, serious danger seems more "negligent" (or more "wrongful") than the merely inadvertent negligent failure to inspect, or the negligent execution of an inspection. Legally, however, it is not clear that any of these are distinctions that ought to make a difference.

Assuming the problem is perceived in terms of "affirmative duty," it is not clear how the problem should be solved. Few of the cases deal with the operation of the Restatement rule on "undertaking." Does the public "rely" on public building-code inspection in the sense of abstaining from self-protective stategems which they otherwise would pursue? Does this generalized, background form of "reliance" satisfy the Restatement's standards? Under what circumstances, if any, does building safety law enforcement "increase the risk" of harm to innocent persons? (The result in Smullon makes sense when regarded in these terms.) Anyway, is the Restatement's specification of the elements of the undertaking doctrine really an appropriate measure of the "affirmative duty" issue in the extraordinary earthquake context which comprises this report's principal concern? All of these questions are in a way open to debate.

G. United States.

There are a number of federal cases on immunity for the granting or revocation of licenses. See Comment, The Federal Seal of Approval: Government Liability for Negligent Inspection, 62 Geo. L.J. 937 (1974). These cases, however, are quite far from the area of government control of private buildings, and hence afford rather attenuated analogies. Most of them revolve around the issue of the "discretionary function" immunity. In Coastwise Packet Co. v. United States, the plaintiff owned a sailing vessel and sought a certification of inspection from the Coast Guard which was a prerequisite for carrying passengers for hire. It took the federal government two years to finally grant the certificate. This delay caused the boat to lose a whole season of trade, and the owner sued for his economic loss. The regulations governing the issuance of certificates are extremely flexible, and require a thorough investigation of the unique features of each vessel. The First Circuit denied recovery, holding that the delays in issuing the certificate were "discretionary." "Plaintiff's is not a case where there was a single, known, objective standard which because of administrative negligence, the Coast Guard failed to apply. In such an area there might be questions. When no standard exists, the process of certifying, insofar as it involves groping for a standard, is within the discretionary exemption of the Act." 398 F.2d 77 (1st Cir.), cert. denied, 393 U.S. 937 (1968).

In United States v. Morrell, 331 F.2d 498 (10th Cir. 1964), plaintiffs sued for the harm caused by trespasses on their lands by livestock owned by the holders of permits which the federal government had issued under the Taylor Grazing Act. The permit itself merely authorizes the permit holder to have his stock graze on federal lands. However, it was apparently "inevitable" that cattle on the federal land would stray onto the plaintiff's land, and the federal officials allegedly knew this when issuing their permits. The Court's ruling was that permit issuance was generally "discretionary," and that knowledge of probable results does not eliminate this discretion. "The Tort Claims Act bars recovery from the United States for discretionary acts of its agencies and employees regardless of whether the discretion be abused." The Morrell opinion

relied on the Court of Appeals earlier opinion in Chournos v. United States, 193 F.2d 321 (10th Cir. 1951), cert. denied, 343 U.S. 977 (1952), which contains a general holding to the effect that the grant or denial of a building permit is a discretionary function and hence immune.

Pennsylvania R.R. v. United States, 124 F. Supp. 52 (D.N.J. 1954), was the consequence of an explosion which occurred in the New Jersey port of South Amboy under extremely complicated factual circumstances not warranting a full reporting here. For present purposes, it is enough to say that a Coast Guard captain issued a permit--in contravention of the pertinent qualifications--allowing a vessel to load and to discharge certain quantities of explosives. Given these existing qualifications, this Court concluded that "the captain had no discretionary function. His duty was to issue the permits, provided only that the normal qualifications were met by the applicant." The Court therefore held that the plaintiffs, victims of the explosion, had stated a cause of action.

H. California.

Section 818.4 of the California Tort Claims Act provides that a "public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked." Section 818.6, meanwhile, provides an immunity for any claims based on a public entity's negligent failure to make an inspection, or its negligence if an inspection is made. The Legislative Comment states that "because of the extensive nature of the inspection activities of public entities, a public entity would be exposed to the risk of liability for virtually all property defects within its jurisdiction if this immunity is not recognized." Finally, § 818.2 immunizes the public entity for tort claims concerning its "failure to enforce a law." This immunity would seemingly cover the cases involving negligent follow-up.

These various immunities have been importantly interpreted by the California Supreme Court's recent decision in Morris v. County of Marin (18 Cal.3d 901, 559 P.2d 606, 136 Cal. Rptr. 251 (1977)). The State Labor Code requires a county, before issuing a building permit, to make sure that the applicant has insurance for workers' compensation. In Morris, the county improperly issued a permit to an uninsured construction employer. In the resulting construction work, an employee fell off a platform and sustained severe injuries resulting in permanent paraplegia. Because of the absence of workers' compensation insurance, the employee's $200,000 claim for workers' compensation benefits was uncollectible. (The state fund for uninsured employers is itself presently insolvent, for lack of a legislative appropriation.)

The Morris Court first determined that a basis for liability could be found in the "mandatory duty" clause of the Tort Claims Act. The Court then considered the application of the "permit" and "failure to enforce" immunities. Here, the Court's conclusion was that, taken in context, the permit immunities apply only when the permit decision is "discretionary;" in Morris itself, given the mandatory duty to withhold the license, there was no "discretion" left to the county officials. The Court then gave a similar reading to the "failure to enforce"

It, too, is limited to "discretionary" failures to enforce, which is precluded in Morris by the mandatory duty.[1] In a footnote, the Court indicated that the limitation it was placing on the permit and law-enforcement immunities would not apply to the inspection immunity; that immunity remains as broad as its language suggests.

In my view, the legal reasoning in Morris that led to the "erosion" of the permit and law enforcement immunities is seriously deficient. But we can put to one side all questions concerning the opinions syllogistic correctness. In functional terms, the Act means what the Court says it means, absent a subsequent legislative intervention. In this sense, Morris is firmly "the law." There are, however, significant ambiguities in the Morris reasoning. First, if it is only "discretionary" permit, license, or law enforcement decisions that are immune, it is necessary to know the meaning of the "discretionary" adjective. If it is true, as the California Supreme Court has sometimes suggested, that "discretionary" acts are high-level "basic policy decisions," then it is hard to see how any decision concerning the local issuance of a building permit could be "discretionary." Since the Morris Court plainly intended the category of "discretionary" permit decisions to have a significant coverage, the Court must have intended some interpretation of "discretionary" less restrictive than the "basic policy decision" gloss; yet what that interpretation is we do not know. Of course, in Morris itself the Court found an absence of "discretion" only because of the presence of a "mandatory duty." One reading of Morris--which is concededly narrow, yet not wholly implausible--is that the permit and law enforcement immunities remain fully in force except when overridden by a "mandatory duty." Even read this narrowly, however, Morris remains of enormous pro-plaintiff importance in the building code context.

(One could restate the matter as follows: "discretion" exists so long as the locality has some area of legal choice--and remains within the area in issuing the permit. This interpretation of Morris would in essence incorporate the "semantic" definition of "discretionary" which the Court declined to accept in Johnson.)

There is a final ambiguity. The Morris holdings will frequently relate to new buildings that are seeking city approval and this approval process has various stages. On the basis of plans presented by the builder, a city issues a building permit, allowing construction upon a finding that the plans themselves comply with the city's building code. Then, when construction is completed, the city inspects the building; if there is building code compliance, the city issues a certificate of occupancy.

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[1]Wait a minute. Textually, the "failure to enforce" immunity is an organic part of the more general immunity for the "adopting or failing to adopt an enactment." § 818.2. Is that immunity now limited to situations where the adoption, or failure to adopt, is "discretionary"? In the enactment-adoption context, what does "discretionary" mean?

There is language in the Law Revision Commission's Comment to § 818.2 that would permit a distinction to be drawn between "law adoption" and "law enforcement," allowing the immunity protecting the former to remain absolute even though the latter's immunity has been narrowed.

After Morris, all "inspection" negligence is immune, but negligence in issuing a permit or certificate of occupany is immune only to a limited degree. What if a certificate of occupancy is issued on the basis of an inspection, in circumstances where negligence in the inspection process signifies that the certificate should not have been issued? Under Morris it is quite unclear whether liability would follow (based on the improper and non-discretionary granting of the certificate) or whether liability would be disallowed (on grounds that the granting of the certificate was no more than the natural consequence of the negligent inspection, and that this element of negligence is itself protected by a complete immunity).

I. Substantive Details of Public Regulation of Private Buildings and Facilities for Earthquake Safety in California.

1. Generally.

In general, building code promulgation and enforcement is a local responsibility. After the 1933 earthquake, however, the state passed an earthquake protection statute (the Riley Act) applicable to almost all buildings in the state constructed subsequent to 1933. The substantive standards are set forth in Health & Safety Code §§ 19150 -51.as amended, §19150 cross-references to the standards set forth in Part 2 of Title 24 of the California Administrative Code. Under § 19101, local governments can establish standards "higher" than those imposed by the state. In fact, Title 24, and also almost all the local standards, are variations upon the Uniform Building Code in its several editions.

Under § 19120, the building department of each city or county "shall enforce" the state legislation. "Shall" is language that triggers mandatory-duty-clause ideas and can (under Morris v. County of Marin) negate the idea of "discretionary" law-enforcement or permit-issuance. However, "shall enforce" is rather vague and general as statutory language. This may be one of those "shall's" which a court could interpret as conveying only a "may"-type meaning.

The enforcement technique on which the statute relies is the requirement that a person secure a "written permit" from the local department before beginning building construction. § 19130. Presumably, the local department must withhold a permit unless the building's plans satisfy the state standards. But this negative obligation is not stated explicitly--and the absence of explicitness may be relevant for "mandatory duty" purposes.

A more general state housing law was enacted by the legislature in 1961. Under § 17921 of the Health and Safety Code, the state Department of Housing and Community Development has the general responsibility for promulgating safety standards for residential dwellings. The next section (§ 17922) stipulates that "except as otherwise specifically provided by law" the state's regulations "shall impose substantially the same requirements as are contained in the most recent editions of the following Uniform Industry Codes: 1) the Uniform Housing Code of the International Conference of Building Officials; 2) the Uniform Building Code of the International Conference of Building Officials. . . ." Unless otherwise stipulated, "the most recent editions of the Uniform Codes referred to" are automatically deemed adopted one year after the date of their publication.

As originally enacted, the state legislation permitted cities and counties to impose standards "greater" than those imposed by the states. However, the relevant provision (§ 17951) was amended in 1970 so as to render the state's requirements more uniform--in the interest of cost economy in residential construction. Under this amendment, local variations from the state norms are allowed only if there are "differences in local conditions" and if the locality makes "express findings as (to the) reasons for those changes;" the legislature's expectation was that this procedure would deter localities from approving "excessive" modifications of the state's code provisions. This state housing statute is limited, by hypothesis, to "housing"--i.e., buildings used for residential purposes; and even for housing it evidently does not detract from the locality's legal ability to impose "higher" earthquake standards under the key provision of the pre-existing earthquake safety statute, § 19101.

While, under the state housing act, regulation of residential buildings may be largely a state responsibility, the administration of these regulations remains a local responsibility. Under § 17960, "the building department of every city or county shall enforce . . . within . . . its jurisdiction all the provisions of this part and rules and regulations promulgated thereinunder pertaining to the erection (etc.) of apartment houses, hotels, or dwellings." Once again, "shall" language can have critical legal significance.

2. The Alquist-Priolo Special Studies Zones Act of 1972.

This Act ordered the State Geologist to designate "special studies zones to encompass all potentially and recently active traces" of earthquake faults that "constitute a potential hazard to structures from surface faulting or fault creep." Official maps of special studies zones were then issued in 1974, which triggered the various requirements contained in the Act. Under § 2623 of the Public Resources Code, "the approval of a project by a city or county shall be in accordance with policies and criteria established by the State Mining and Geology Board and the findings of the State Geologist." The Policies and Criteria promulgated by the State Mining and Geology Board under the Act include the following "specific criteria."

> No structure for human occupancy, public or private, shall be permitted to be placed across the trace of an active fault. Furthermore, the area within fifty feet of an active fault shall be assumed to be underlain by active branches of that fault unless and until proven otherwise by an appropriate geologist registered in the State of California.

These criteria place on cities and counties an implied "mandatory duty" to deny or withhold a building permit or certificate of occupancy to any occupancy structure covered by the criteria's prohibition. There are, however, some uncertainties. The fifty-foot presumption can be "proven otherwise" by "an appropriate geological investigation." Presumably, it is the permit-issuing public entity that makes the determination, at least in the first instance, as to whether the geological investigation does in fact "prove otherwise" within the sense of the Act. To what extent are these determinations subject to judicial (or tort) review? Another problem is that the specific criteria cover all dwellings. Yet the Act itself, in its definition of "project" (the approval of

which must conform to these criteria), excludes "single family wood-frame dwellings not exceeding two stories" unless those dwellings are part of "a development of four or more such dwellings." § 2621.6 Insofar as the promulgated criterion professions to apply to all private dwellings, this criterion may be unauthorized by the Act itself, and hence without legal force. (The Act in its original form did contain appropriate authorizing language, but this language was later amended out.)

The criteria also require cities and counties to withhold "a development permit for any project" unless the application for such a permit is "accompanied by a geologic report prepared by a geologist registered in the State of California" and unless that report accompanying the application is then "evaluated" by another geologist who is in turn "retained" by the city or county. By hypothesis, the geological report submitted by the developer will be affirmative. If the report submitted by the public entity's geologist is negative, it appears that the public entity is required to consider that report, but not necessarily to follow its recommendation. That is, there is a mandatory duty operating on cities to make sure that the applicant has included a geological report, and to give consideration to the report prepared by the public entity's own geologist--but not to accede to this geologist's recommendation in every case.

3. Hospitals.

Under § 15000 of the Health and Safety Code, enacted in 1972 as a consequence of the 1971 San Fernando quake, the state has essentially preempted from local jurisdictions the regulation of hospitals.

> It is the intent of the Legislature that hospitals, which house patients having less than the capacity of normally healthy persons to protect themselves, and which must be completely functional to perform all necessary services to the public after a disaster, shall be designed and constructed to resist, insofar as practicable, the forces generated by earthquakes, gravity, and wind. In order to accomplish this purpose, the Legislature intends to establish proper building standards for earthquake resistance based upon current knowledge, and intends that procedures for the design and construction of hospitals be subject to independent review.

Under § 15007, "the state (Health) department, through its contract with the Department of General Services, shall pass upon and approve or reject all plans for the construction or the alteration of any hospital building, independently reviewing the design in geological data to assure compliance with requirements of this chapter." Under § 15001.5, construction of new hospitals "shall conform to the provisions of the latest edition of the Uniform Building Code;" also, "a structural engineer shall submit a declaration that, in his opinion and to the best of his knowledge, the design and construction of such buildings comply with such standards." Under § 15016, the State Department, through the Department of General Services, "shall make such inspection of the hospital buildings and of the work of construction or alteration as in its judgment is necessary or proper for the enforcement of this chapter in the protection of the safety of the public."

There is nothing in this legislation concerning tort liability or immunity. Undoubtedly, the legislature in passing the statute had in mind the seemingly absolute immunities for approvals and inspections that are set forth in the Tort Claims Act. Subsequent to the enactment of this legislation, however, the Supreme Court has narrowed, in the Morris case, the scope of the approval immunity; that immunity evidently now applies only where the approval decision is "discretionary." The concept of a "non-discretionary" approval is fuzzy, but it at least includes an approval that violates a legal "mandatory duty" to withhold the approval.

4. Dams.

Under §§ 6025-26 of the Water Code, the regulation and supervision of dams and reservoirs is rendered an exclusive state function; the authority that cities and counties would otherwise possess to regulate or supervise such dams and reservoirs is explicitly superseded. Section 6075 stipulates that the state Department of Water Resources "shall supervise the construction, enlargement . . . of dams and reservoirs for the protection of life and property as provided in this part." Under § 6081, "the department shall take into consideration the possibility that the dam" could be threatened by an earthquake; and whenever the department concludes that such a threat exists, "it shall order the owner to take such action as the department determines to be necessary to remove the resultant danger."

All of these "shall" clauses raise the spectre of a significant potential liability under the "mandatory duty" clause of the Tort Claims Act. However, those possibilities are negated by § 6028, which indicates that the state and its employees are immune from all danger liability for any claims based on the improper approval of a dam, the improper issuance or enforcement of orders relating to maintenance or operation of the dam, the improper control and regulation of the the dam, or improper measures taken to protect against failures during an emergency. Given the exceedingly strong § 6028 immunity, the state seems immune from any readily imaginable claim based upon its improper supervision of dams owned by others. Does Morris v. County of Marin impliedly limit this §6028 immunity? This is very unlikely, but I don't doubt that an aggressive lawyer would try the argument.

For public entities, one clear liability exposure concerning dams after an earthquake would emerge if the dam is actually owned or operated by a public entity--either the state or a local government. Sec. 6029 makes clear that "nothing in this part shall be construed to relieve an owner or operator of a dam or reservoir of the legal duties, obligations, or liabilities incident to the ownership or operation of the dam or reservoir." What are such "duties, obligations, or liabilities?" Since the dam is now assumed to be public property, all the provisions on public-property-in-a-dangerous-condition contained in the Tort Claims Act (see below) would be relied on to establish liability against the state or local government which owns or operates a dam for improper ownership or operation. Also, there are a number of obligations placed on dam owners and operators by the Water Code itself. Default on any of these obligations could create liability under the "mandatory duty" clause of the Tort Claims Act. Thus, under §6101, the owner of a dam "shall fully and promptly advise the department of any sudden . . . alarming circumstance or occurrence affecting the dam or reservoir. Under § 6202, the owner's application for dam approval "shall give"

certain information. Also, under § 6203, the Department "may also require" information concerning "the geology of the dam or . . . possible geologic hazards." If the Department has imposed some relevant requirement, and the public entity owning the dam has not complied therewith, a question of liability arises under the "mandatory duty" clause. Under § 6225, the dam owner "shall secure the written approval of the department" before beginning repair, alteration or removal of any dam. Failure to secure such approval could result in liability for the dam-owning public entity.

Under a statute enacted in 1972 as a response to the 1971 earthquake, the owner of a dam, whether a public entity or not, must prepare and submit to the Office of Emergency Services an "inundation map showing the areas of potential flooding in the event of a sudden or total failure of any dam." Government Code §8589.5 (a). This requirement extends to all dams whose partial or total failure would result in death or personal injury, in the assessment of the OES. Dam owners have six months to prepare their maps. OES review of the adequacy of the maps is required. Armed with these maps, OES is to designate areas of dam-failure danger. "The appropriate public safety agencies of any (local government) the territory of which includes such an area, shall adopt emergency procedures for the evacuation and control of populated areas below such dams." § 8589.5(b). The OES reviews these procedures for adequacy. The procedures "shall conform to local needs," and may be required to include any or all of ten different elements, "including, for example, methods for the movement of people without their own transportation."

If a local government has failed to prepare an evacuation plan, it faces the prospect of mandatory-duty liability in the event of an earthquake-induced dam failure. Here, however, there are significant problems with tort law's cause-in-fact requirement: would the preparation of a plan have been successful in avoiding the adverse result? (See the discussion at pp. 66-67 infra.) If the plan has been prepared and is under review by OES at the time the earthquake hit, the tort law implications are very unclear. If its plan has been approved by OES and then is neglected by the local government in the event of an earthquake, once again a mandatory-duty possibility emerges. While it is uncertain whether mandatory duties can be "self-inflicted" (see p. 17) the state OES approval of the local plan would seemingly eliminate this uncertainity by placing state authority behind the plan. One question would be whether the particular "element" in the plan which the local government neglects is indeed expressed in obligatory terms or rather in goal-oriented terms. If the latter, the plan may fall short of a "mandatory duty."

Is the plan "self-executing," or does it require a local enactment to carry it out? If the former, then we know from Morris that mandatory duty liability prevails over the law-enforcement immunity in § 818.2. But if the latter, it is uncertain whether mandatory-duty liability prevails over § 818.2's enactment-adoption immunity. Of course, mandatory duty liability is itself negated if the public entity can show that it "exercised reasonable diligence" in attempting to discharge that duty.

IV. LIABILITY FOR HARM CAUSED BY THE COLLAPSE DURING AN EARTHQUAKE OF A PUBLIC BUILDING

Precis:

Washington and Alaska have professed to apply general principles of negligence to cases involving public buildings. The Washington and Alaska cases, however, have mainly involved negligence in the maintaining of public property; they have rarely reached questions of public property design. It is possible that in a pure design case, these jurisdictions would consider application of their discretionary immunity. This is a distinction that is suggested by the case law under the Federal Tort Claims Act. Ordinary principles of negligence have been easily applied to ordinary problems of public property maintenance. When, however, questions of public property design have been presented, some federal courts have been willing to apply the discretionary immunity.

On the matter of public facility design, New York case law has established a certain precedent which the California Act has followed. The sequence of arguments that would be relevant to the liability question in either California or New York is rather complicated, and will be set forth, in a somewhat diagrammatic form, in the Summary.

For California school boards, the mere utilization of unimproved pre-1933 school buildings in the post-1975 period constitutes a violation of a "mandatory duty." If the building has been improved up to the standards of the Field Act, but if the building should (arguably) be improved further in order to make it reasonably safe, it is unclear whether Field Act compliance would bar a Tort Claims Act lawsuit.

A. California.

The California Act contains elaborate, yet reasonably specific provisions concerning public entity liability for injuries caused by defects in public property. Government Code § 835 creates liability for injuries caused by "public property in a dangerous condition." A "dangerous" condition is defined by § 830(a) as a condition creating "a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury," and a danger which exists "when such property is used with due care in a manner which is...reasonably foreseeable." (It is quite unclear what Richter-scale earthquake should be regarded as "reasonably foreseeable;" a related question is what the time-frame is for the "foreseeability" determination.) Ordinarily, whether a danger is "substantial" as compared to "minor" goes to the jury; however, in exceptional cases, the Court will rule on this question as a matter of law. See, e.g., Fielder v. City of Glendale, 71 Cal. App. 3d 719, 139 Cal. Rptr. 876 (1977), holding that a 1/4 inch depression in a sidewalk poses only a "trivial" danger as a matter of law. The danger must exist, as indicated, when the property is being used "with due care." This does not mean that a lawsuit cannot be brought simply because somewhere in the causation of a particular accident there was an

absence of due care. But it does mean that conditions which are rendered dangerous because of the foreseeable careless conduct of public property users are exempt from liability under the Act, notwithstanding the foreseeability of that misconduct. Thus, if it is assumed that cars cross a median strip or overrun a T-intersection only if they are not operated with "due care," there can be no liability claim for the failure of the state to erect a median strip barrier or ameliorate the intersection. See Callahan v. City & County of San Francisco, 15 Cal. App. 3d 374, 93 Cal. Rptr. 122 (1971). This "with due care" requirement seems out of line with recent developments in California tort law. Li v. Yellow Cab Co. holds that the careless conduct of the accident victim, regarded as contributory negligence, merely reduces rather than eliminates the victim's tort recovery. And products cases make clear that in designing a product non-defectively, manufacturers are required to concern themselves with instances of "foreseeable misuse" of the product on the part of product consumers. See Cronin v. J.B.E. Olsen. Corp., 8 Cal. 3d 121, 501 P.2d 1153, 104 Cal. Rptr. 433 (1972). Perhaps because of this tension between the "with due care" requirement and other contemporary tort developments, recent Court of Appeal opinions have applied the requirement in what seems to be only a lip-service way. See, e.g., Harland v. State, 75 Cal. App. 3d 475, 142 Cal. Rptr. 201 (1977), revising 141 Cal. Rptr. 215 (1977).

Under § 835, liability exists for public property in a dangerous condition if the victim's injury was "proximately caused" by the dangerous condition, and if either the danger was "created" by a negligent or wrongful act or omission of a public employee, or if "the public entity had actual or constructive notice of the dangerous condition...a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." Under § 835.2, "actual notice" means actual knowledge of the existence of the conditions and either actual knowledge or should-have-knowledge of the condition's dangerous character. "Constructive notice" means that the condition "had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character": herein of "reasonably adequate" inspection systems. Section 835.4 confirms the converse of § 835; where the act creating the dangerous condition is "reasonable" rather than "negligent or wrongful," there is no liability for the creation of the condition; "reasonableness" is to be determined by weighing "the probability and gravity of potential injury" against the "practicability and cost" of the safer alternative. When liability is based on failure to maintain or repair under § 835(b), liability is negated if the public entity "establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable." Here too, reasonableness is to be determined by weighing "the probability and gravity of potential injury" as against "the practicability and cost of protecting against the risk."

Essentially, the §§ 835-835.4 combination provides a rule of negligence liability. The public entity can be liable for negligently creating the dangerous condition in the first place; it can be liable when it knows of a danger and unreasonably fails to repair or maintain the public property in order to eliminate that danger; and it can be liable if its negligent failure to inspect the property prevents it from detecting dangers which themselves are reasonably preventable. (There may be one wrinkle here; given the wording of § 835.4(b), it may be that the public entity is liable if it does nothing in order to repair the dangerous conditions, even if everything it could reasonably have done would not have been effective in preventing the danger. This is a wrinkle which the case law so far has not explored.) Under the negligence rules of the § 835's, the status of the victim as an entrant upon the public entity's land--whether invitee, licensee, or trespasser--is of no relevance.

An important kicker is added, however, by § 830.6. Where the danger has been created by the plan or design of a construction of public property, and where that plan or design "has been approved in advance...by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval," liability does not exist so long as "there is any substantial evidence supporting the reasonableness of the plan or design decision."

Section 830.6 is frequently decisive in suits against public entities. See, e.g., Thomson v. City of Glendale, 61 Cal. App. 3d 387, 132 Cal. Rptr. 52 (1976). After the 1971 Sylmar earthquake, one § 830.6 lawsuit reached the appellate level. In Mikkelsen v. State, 59 Cal. App. 3d 621, 130 Cal. Rptr. 780 (1976), deaths had resulted from the collapse of a bridge over the Golden State Freeway. Plaintiffs alleged that the Division of Highways, in approving the design of the bridge, unreasonably failed to take into account the earthquake contingency. The trial court determined that the plaintiffs' negligence count was ruled out by § 830.6, and this conclusion was evidently not challenged on appeal. Rather, the Mikkelsen plaintiffs sought to avoid § 830.6 by bringing their action under a "nuisance" theory rather than a negligent theory. The Court of Appeals holding was that the design immunity applied on the Mikkelsen facts regardless of whether the plaintiff was suing under negligence or nuisance. This result seems correct.

It must be noted, however, that as an affirmative defense § 830.6 contains significant limitations. Technically speaking, § 830.6--though often referred to as a "design immunity" provision--establishes not a rule of "immunity" but rather a rule of "deference." A jury is prevented from making up its own mind as to what a proper property design would be only if the reasonableness of the public entity's design decision is found by the jury to be supported by "substantial evidence." In a number of cases, e.g., Davis v. Cordova Recreation & Park Dist., 24 Cal. App. 3d 789, 101 Cal. Rptr.

358 (1972), § 830.6 has been held inapplicable because the evidence did not adequately support the "reasonableness" of the original design decision.

The Supreme Court has taken strong steps towards narrowing the § 830.6 design deference rule. In Cameron v. State (7 Cal. 3d 318, 497 P.2d 777, 102 Cal. Rptr. 305 (1972)), the Court held that § 830.6 requires deference only if the particular design feature was actually considered in some reasonably explicit way by the appropriate city official. (This limitation is in line with the Court's observation that the purpose behind § 830.6 is to prevent lay juries from second-guessing public officials' decisions.) For an example of the difficulty of applying this "consideration" requirement, compare Anderson v. City of Thousand Oaks (132 Cal. Rptr. 882 (1976)) with the same case upon rehearing (65 Cal. App. 3d 82, 135 Cal. Rptr. 127 (1976)). In the earthquake context, Cameron means that public entities will need to show, in order to invoke the § 830.6 defense, that they did indeed advert to earthquake factors in reaching their design decisions. Secondly, the Cameron Court held that even if the design feature is itself covered by § 830.6, the public entity can still be liable for its concurrent passive negligence in failing to give a reasonable warning of the dangerous condition (if such a warning would have been probably successful in preventing the injury). Given the unexpectedness of any earthquake, it is unclear what warning obligations Cameron imposes on public entities respecting public buildings that are earthquake-vulnerable. Perhaps, however, the more important limitation which the Court has placed on § 830.6 came in Baldwin v. State, 6 Cal. 3d 424, 491 P.2d 1121, 99 Cal. Rptr. 145 (1972). Here the Court indicated that even if the public entity's original design decision is per se protected by § 830.6, § 830.6 can be rendered inapplicable if "changed conditions" subsequent to the original design approval have demonstrated the substantial danger in the design feature. Since "changed conditions" were present in Baldwin, the Court concluded that the plaintiff's claim that a state highway should have included a special left-turn lane was unencumbered by the § 830.6 defense.

Now, the strongest kind of "changed condition" would be a physical change in either the public property itself or the other property adjacent to or underneath the public property. (Baldwin itself refers to "changed physical conditions.") The "changed conditions" relied on in Baldwin itself, however, were merely (1) a much higher level of traffic on the highway than had been originally expected, and (2) a terrible actual accident record at the particular intersection.

There has been surprisingly little post-Baldwin litigation as to what counts as a "changed condition." For purposes of the present report, it is unclear whether any of the following are "changed conditions": (1) new information about earthquakes which suggests that a structure is more dangerous than was originally supposed;

(2) new technology which makes it possible to render structures more resistant to earthquakes; (3) new "standards" for building safety established, for example, by changes in the Uniform Building Code. On this last point, the Court of Appeal's ruling in Thomson v. City of Glendale, 61 Cal. App. 3d 378, 132 Cal. Rptr. 52 (1976), can be read as holding that UBC amendments are not changed conditions for Baldwin purposes.

In reaching its "changed conditions" conclusion, the Baldwin Court overruled two of the Court's previous decisions holding that the § 830.6 defense is permanent, and rejected the "permanent" view of the § 830.6 immunity set forward by Professor Van Alstyne in his CEB treatise on the Act. If, however, the purpose of § 830.6 is to prevent jury second-guessing of the official design decision, the Court's opinion seems correct. In cases like Baldwin, it is not really the original decision that is being challenged as negligent, but rather the failure to reconsider that decision in light of newly available factual information: see Baldwin's discussion of the public entity's "ostrich-like" refusal to take account of highway's staggering accident record. If this, however, is a proper understanding of Baldwin, then the Baldwin holding includes an inherent limitation. Assume that appropriate public officials do in fact reconsider the design of the public property in light of the new factual information, and assume further that this reconsideration leads to an official, recorded decision that no correction is warranted. Even given Baldwin, there is no reason why the "inaction" decision should not be afforded § 830.6 protection. To allow jury review of that decision would be to entail the kind of jury second-guessing which § 830.6, as explained by Baldwin, is intended to preclude. Of course, if "inaction decisions" are held covered by § 830.6, there is a danger that such decisions would in fact be made in a perfunctory or meaningless way. But should any such decision be meaninglessly rendered, the decision may not satisfy the "substantial evidence" element which triggers the application of § 830.6's deference rule.

In any event, it should be clear that in any case proceeding under a Baldwin theory, the public entity is essentially being charged with negligence in failing to alter the public structure, rather than with any ex post facto negligence in its construction of the structure in the first place. If it is the failure to alter or modify that is challenged as negligent under the Act, then clearly the cost of such alternation or modification must be taken into account in assessing whether the public entity is freed of liability by the "reasonableness" element of § 835.4. In this regard, Baldwin itself, given the Baldwin facts, was an easy case: the cost of installing a left turn lane on the existing highway would only have been $20,000. Miller v. City of Burbank involved the debris basin of a flood control district which overflowed, causing a mudslide. The Court of Appeal found that the district's new information (as to the mudslide danger) circumvented § 830.6.

Nevertheless, given the fact that the basin was already in place, all the District could possibly have done to minimize the risk of harm would have been to install culverts and add higher curbs. These steps, the Court of Appeal concluded, were excessively costly in a financial sense; § 835.4 thus prevented the imposition of tort liability. 102 Cal. Rptr. 559 (1972), vacated on other grounds, 8 Cal. 3d 689, 505 P.2d 193, 106 Cal. Rptr. 1 (1973).

John Evans has recently described the following dangerous public building scenario, which we have reason to believe is a common one. The hypothetical situation would be as follows:

> A local public entity has a large office building-type structure constructed 30 or 40 years ago, according to then-accepted structural design principles. Circumstances change when the local entity finds out through a study it commissioned that an earthquake trace runs beneath or very near the structure. The study states that the building will not be able to withstand a reasonably heavy quake and predicts a partial collapse. The public entity does not have funds to replace the building and is estimating that 3 or 4 years would be necessary to accumulate the necessary resources. Design and construction of the new facility would require at least 2 years. There is no place to relocate the essential public functions that are carried on in the building without prohibitive expense and considerable loss in efficiency to the public entity. The functions carried on in the building (large numbers of staff, public meetings, etc.) give it a high human occupancy during most of the daylight and evening hours at least 5 days a week. The question is, what is a reasonable course for the public entity to follow in light of Baldwin v. State?...Given the public entity's financial circumstances and the need for the types of public services carried on in the building (for example, police and essential administrative functions), over what period of time may the public entity reasonably extend its program to acquire funding and activities to replace the building with a new structure?

The answers to these questions are: that there are no answers. The statute merely advises us to balance the magnitude of the risk against the cost of preventing the risk. And in cases where the balancing process does not produce an unequivocal result, the issue goes to the jury for decision, under appropriate instructions. Ever since Homes, students of tort law have complained about the "featureless generality" of tort law's "reasonableness" standard.

There is, however, one particular facet of the problem meriting discussion. In passing on the propriety of the public entity's conduct, to what extent can account be taken of the fact that the public entity is operating on a limited budget, one which prevents it from investing in all programs or projects which are in fact

cost-beneficial? It is generally said that the indigence of a party is not a factor relevant to the tort-law standard of reasonable conduct. It is also true that in routine public entity tort cases, courts impliedly ignore budgetary constraints all the time. "Every time a municipality is held liable for a defective sidewalk, it is as if the courts are saying that more money and resources should have been allocated to sidewalk repair, instead of to other public services." Riss v. City of New York, 22 N.Y.2d 579, 588, 240 N.E.2d 860, 862, 293 N.Y.S.2d 897, 904 (1968) (Keating, J., dissenting).

Yet when budgetary considerations involving major expenditures are brought to the attention of the court, respect is sometimes paid. See the federal Ure case, discussed below. See also the majority opinion in Riss v. City of New York, in which the New York Court of Appeals refused to impose liability on the city whose police department refused to provide police protection to a young woman whose life had been repeatedly threatened.

> (t)his case involves the provision of a governmental service to protect the public generally from external hazards and particularly to control the activities of criminal wrongdoers. The amount of protection that may be provided is limited by those resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort, even to those who may be the particular seekers of protection based on specific hazards, could and would inevitably determine how the limited police resources of the community should be allocated and without predictable limits. This is quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided.

Riss is, of course, an affirmative-duty case rather than a public building case, and the provisions on dangerous public property in the California Act rather clearly exclude the general "discretionary" defense. However, those provisions do refer not only to the "cost" of safety expenditures but also to their "practicability," and it would be easy to make the argument that budgetary constraints are relevant to "practicability."

A final point concerning California law is that, the §§ 830's apart, there are two other theories that a plaintiff could possibly rely on in the event of harm caused by public property. First, the plaintiff could argue that the public entity is liable for having created a "nuisance." Nestle v. City of Santa Monica, 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972), holds (suprisingly) that nuisance liability is not precluded by the 1963 Act. Vedder v. County of Imperial, 36 Cal. App. 3d 654, 111 Cal. Rptr. 728 (1974), indicates that an airport lacking in fire-fighting equipment could

be regarded as a nuisance. "Nuisance" is a terribly vague concept under California law; see the promiscuous definition of nuisance set out in Civil Code § 3479. It would be surprising, in a public property case, if a claimant could prevail under a nuisance theory in circumstances where relief was not available under the §§ 830's. In Vedder itself, the Court did approve a nuisance action, but in conjunction with a cause of action validly based on the §§ 830's. Note, also, the Mikkelsen holding that the Act's design immunity is applicable even to an action characterized as "nuisance."

Secondly, the Baldwin opinion hints at the cause of action under a constitutional theory. The opinion cites the California Constitutional provision that "private property shall not be taken or damaged for public use without just compensation." Quoting language from its earlier decision in Albers v. County of Los Angeles, 62 Cal. 2d 250, 398 P.2d 129, 42 Cal. Rptr. 89 (1965), the Court suggested that where there is injury to "property" resulting from deliberate governmental action, compensation may be constitutionally required even without regard to whether this injury was foreseeable. Baldwin itself was of course a case involving injury to person rather than to property. The Baldwin opinion reasons that it would be odd to read § 830.6 as providing less protection to persons than the Constitution provides to property--and Baldwin intimates that § 830.6 might be unconstitutional as applied to cases involving property damage. See also the holding in Miller v. City of Burbank, 102 Cal. Rptr. 559 (1972), vacated on other grounds, 8 Cal. 3d 689, 505 P.2d 193, 106 Cal. Rptr. 1 (1973). Albers itself, though decided on constitutional inverse condemnation grounds, involved tort-like facts--a landslide damaging plaintiffs' property brought about by the operations of the county's road builders. Inverse condemnation is a very intricate theory established by constitutional law rather than by tort law. Moreover, given its constitutional status, it is not within the effective control of state or local law-making bodies or tort law reformers. As such, it is beyond the scope of this report.

B. New York.

New York law lacks any of the specific provisions on public property of the sort that are found in California law. Under New York law, therefore, the plaintiff, given the waiver of sovereign immunity, must basically establish the negligence of the public entity--either negligence in designing public property, negligence in constructing or supervising the construction of public property, negligent inspection of public property, or negligent repair or failure to alter public property once its dangers become apparent. It is clear from New York cases that the obligation of avoiding negligence respecting the supervision and modification of a public facility is an obligation that continues throughout the life of the facility.

However, Weiss v. Fote, discussed above, establishes a limited immunity respecting claims based on the allegedly negligent design. This limited immunity is akin to, and the father of, the design immunity rule found in the California Act. The Weiss immunity rule has been frequently applied. See, e.g., Stuart-Bullock v. State, 33 N.Y.2d 418, 309 N.E.2d 419, 353 N.Y.S.2d 953 (1974), refusing to hold the state liable for the failure to install a median barrier on a state highway. A phrase appears in the Weiss opinion suggesting that the Weiss rule might be limited to highway cases. But there is no adequate policy reason why the rule should not be applied in any case dealing with the design of any public facility; and while most of the Weiss cases have involved highways, the Weiss rule has been relied on in other public facility cases without the courts even thinking to suggest that Weiss is being in any way broadened. See, e.g., Sepola v. Town of Huntington, 20 A.D.2d 559, 245 N.Y.S.2d 55 (1963), involving a sump and appurtenances.

The Weiss rule is limited to situations where the public entity has made an "adequate study" of the design problem before reaching its design decision; and New York courts have been willing to review, under Weiss, the adequacy of the public entity's study. See, e.g., Zalewski v. State, 53 A.D. 2d 781, 384 N.Y.S.2d 545 (1976) (denying adequate study) and Franks v. State, 55 A.D.2d 978, 390 N.Y.S.2d 689 (affirming adequate study). Also, the Weiss rule does not apply when the public entity's decision lacks a "reasonable basis," and the New York courts have been occasionally willing to make no-reasonable basis determinations. See, e.g., Warren v. New York State Thruway Authority, 51 A.D.2d 679, 378 N.Y.S.2d 530 (1976). In one case, the traffic lights provided by the public entity not only were inadequate, but were plainly deceptive to motorists. Here the Court was clearly hostile to any notion of immunizing the state from liability, and was willing to "distinguish" Weiss on grounds that, given the element of deceptiveness, the state had created a "trap" and "nuisance." King v. State, 370 N.Y.S.2d 1000 (Ct. Cl. (1975)). On the "nuisance" issue, compare the contrary California ruling in Mikkelsen, supra. But the "deception-trap" feature seems the key to the King holding.

In line with Baldwin, the New York opinion clearly recognizes that even once the original design decision has been made, public entities are under a continuing obligation to review the reasonableness of the design. (Indeed, Baldwin relied on the New York precedents.) Where, however, the state does conduct a review and decides that no modification is appropriate, it appears that New York courts recognize the idea that the Weiss v. Fote deference rule applies to this decision not to modify the public facility. See Niagra Frontier Transit System, Inc. v. State, 57 A.D.2d 59, 394 N.Y.S.2d 930 (1977); Schoonmaker v. State, 32 A.D.2d 1005, 302 N.Y.S.2d 65 (1969). See the discussion on this issue in the California section above.

Since New York has now abandoned tort law's traditional distinctions as to the plaintiff's status--invitee, licensee, or trespasser--in suits against landowners generally, see Scurti v. City of New York, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976), these distinctions are now no longer relevant in suits against public landowners either--as the facts of Scurti itself makes clear.

C. Washington.

Given the Washington system, in light of the abrogation of governmental immunity, all questions of public entity liability are governed by general principles of negligence. In the public property area, there are a few cases which use somewhat mechanical language in the public property area. Thus Impero v. Whatcom Co., 71 Wash. 2d 438, 430 P.2d 173 (1967), in discussing public entity liability for public property in a "dangerous condition," indicates that public entities can be liable if they have "created" the danger or if they have "constructive notice" of the danger. Clearly, however, such concepts are capable of being understood as spinoffs on the more general negligence concept. I have spoken with the City Attorney's Office in Seattle, which is of course the largest city in the state of Washington; this Office advises me that it views negligence as the basic test of liability in all public facility cases. Cases like Breivo v. City of Aberdeen, 15 Wash. App. 520, 550 P.2d 1164 (1976) validate this view (city "obligated to exercise ordinary care to keep its public ways in a reasonably safe condition"). Likewise, see South v. Acme Paving Co., 16 Wash. App. 389, 558 P.2d 811 (1976).

Washington law recognizes an immunity for "truly discretionary acts," and Washington cases[1] have cited Weiss v. Fote for the general proposition that separation-of-powers must be taken into account in delimiting public-entity liability. But there is no indication that Washington has accepted the Weiss v. Fote holding that deference must be paid to the public-entity discussions as to the design of public property. It seems doubtful that a New York-like or California-like design immunity rule can be justified by general "discretionary" reasoning. It may well be true that "choice" is involved in designing a public facility, and the choice may be highly "expert" in character. But the discretion in question remains "engineering" discretion rather than "policy" or "governmental" discretion; and this assessment probably should defeat the discretionary immunity claim. Compare the majority and dissenting opinions in Dalehite, and see the recent federal decision in Griffin v. United States, all discussed above. It should be noted, however, that Washington law is still in a rather youthful stage. One cannot preclude the possibility that the Washington courts would recognize a Weiss-Fote-like rule of deference, or would apply the "discretionary" immunity when

[1] Evangelical, for example.

confronted with a head-on challenge to the reasonableness of a design decision explicitly rendered by a high-ranking public official. The "Working Draft" of a legislative proposal prepared by the Washington State Association of Municipal Attorneys in June 1978 seeks to establish a "design" immunity for Washington law, but an immunity applicable only to "highways, streets, sidewalks, parks, and garbage facilities." Moreover, this immunity could be overcome by the showing that the design is "inherently dangerous."

Washington has ameliorated, but it has not abandoned, the common law's status distinctions in suits against landowners. See Memel v. Raimer, 85 Wash. 2d 865, 538 P.2d 517 (1975). Here a landowner has only minimal liability to a trespasser; as for "licensees" the landowner is liable only for "known dangers," and discharges his duty by merely giving a warning. Presumably, these status rules are fully applicable in suits against public-entity landowners. However, the Washington highway-defect cases do not even pause to consider whether the motorist is to be regarded as an "invitee" or "licensee" on the highway; the assumption may be that any member of the public is, absent unusual circumstances, an "invitee" when on a public facility or in a public building for a proper reason.

D. Alaska.

Alaska case law, like Washington, has applied ordinary negligence principles to the public entity as landowner. See State v. Abbott, 498 P.2d 712 (Alaska 1972); Webb v. City of Sitka, 561 P.2d 731 (Alaska 1977). The Alaska opinions typically deal with public-facility maintenance rather than public facility design. The possibility of "discretionary" immunity for matters of design cannot therefore be ruled out; even in the maintenance context, Abbott gave serious consideration to a "discretionary" claim. In Webb, the city argued that the plaintiff, walking on the city's sidewalk, was a mere "licensee" and hence entitled only to a limited duty or care. The Alaska Supreme Court took Webb as the occasion for abandoning the invitee-licensee-trespasser distinctions in Alaska law; after Webb, the negligence of the landowner (whether public or private) makes it liable to any person foreseeably coming upon the owner's land.

E. United States.

Under the Federal Tort Claims Act, the United States is liable in tort as a private party would be pursuant to the substantive law of the state where the accident occurred. On the question of the relevance of the status of the plaintiff as an entrant upon another's property, a claim arising under the Act would therefore "pick up" its substantive law from the state where the injury occurred.

In federal cases, a key question is the extent to which the negligent conduct responsible for the dangerous condition of public property can be regarded as "discretionary." Here there are no relevent Supreme Court decisions in point. One must turn instead to the decision of the federal Courts of Appeals and the District Courts. Leading opinions from these courts are referred to below.

In McNamara v. United States, 199 F. Supp. 879 (D.D.C. 1961) the floor of the Capitol Building in Washington, D.C. over the course of time had become somewhat worn and uneven and for this reason dangerous to passers by. The plaintiff fell, and sued the United States. The District Court ruled that while "it may be that designing a building is a discretionary function,...maintenance of a safe condition within a building is not a discretionary function."

In Seaboard Coast Line R.R. Co. v. United States, 473 F.2d 714 (5th Cir. 1973) plaintiff's property was damaged after the government built a drainage ditch for the purposes of furthering the construction of an aircraft maintenance facility. According to the Court, "the discretionary function...was the government's policy decision to construct an aircraft maintenance facility... and to build a drainage system in furtherance of that goal. Once the government decided to build the drainage ditch, it was no longer exercising a discretionary policy-making function and it was required to perform the operational function of building the drainage ditch in a non-negligent manner." This makes the government's negligence sound like "construction" negligence; elsewhere, however, the Court characterizes the plaintiff's claim as one referring to the government's "negligent design of the drainage system."

In American Exchange Bank v. United States, 257 F.2d 938 (7th Cir. 1958), plaintiff fell on post office steps, and complained about the absence of a handrail alongside those steps. The District Court's judgment that the decision not to include a handrail in the design of the steps was immune was reversed by the Court of Appeals, which indicated that the decision on building the post office and on where to locate the post office were "discretionary," but that precise decisions concerning building design, like those involving the placement of handrails, were merely "operational."

Stanley v. United States, 347 F. Supp. 1088 (D. Maine 1972) indicates, however, how complicated handrail cases can become. Here the plaintiff was injured because of the absence of handrails along ladder holds in platforms on a naval radio tower. This raised a question of the tower's "design." The District Court rejected the government's argument that all matters of public facility design are "discretionary." "Here, apart from a slight cost increase, the decision of the United States as property owner involved no competing policy considerations. The court therefore holds that the failure to provide guard rails involved a miscalculation solely at the operational level...." But the Court indicated that its result might have

been different if the ingredients of the government's decision had been different. "Had the evidence warranted the conclusion that railings would have interfered with the electronic performance of the tower or with its usefulness in other respects, the omission of the railing might have fallen within the 'discretionary function' exception." Here, too, it becomes clear that the reasons for the public entity's decision, and the advocate's ability to characterize that decision in appropriate terms, may well be decisive on the immunity issue.

At least two Courts of Appeals have found "discretion" and hence immunity in the determination by the federal Secretary of Transportation (or Commerce) that a plan submitted by a state highway department meets federal standards, and hence that federal money should be released to the state for building the highway in question. See Mahler v. United States, 306 F.2d 713 (3d Cir.) cert. denied, 371 U.S. 923 (1962); Daniel v. United States, 426 F.2d 281 (5th Cir. 1970). These courts were evidently influenced by the high-sounding (and imprecise) statutory standards that the Secretary is required to consider in passing on federal-aid highway proposals. Undoubtedly, the status of an actual Secretarial decision also weighed on these counts. See, in the same vein, In re Silver Bridge Disaster Litigation, 381 F. Supp. 931, 968-970 (S.D. W. Va. 1974), reaching a similar result with respect to the plans for a bridge approved by the Secretary of War. Daniel is distinguished in the Seaboard Coast Line case (described above) on grounds that the federal government was much more deeply involved in Seaboard than it was in Daniel: in Daniel all the federal government did was approve the plans for purposes of federal aid, while in Seaboard, the federal government prepared the plans in the first place, constructed the facility, and owned it after its construction was completed.

Finally, there is the provocative case of United States v. Ure, 225 F.2d 709 (9th Cir. 1955). Here the alleged negligence which caused the plaintiff's injury was a decision in the construction of a federal canal not to "line" the canal with concrete or some similar material. Such lining would have created some safety benefits; the problem with lining involved "the vital item of cost." This irrigation project, governmental officials testified, could be built only upon a determination of economic "feasibility." Had such elements as lining been included in the cost, their inclusion would have precluded a favorable feasibility finding. On these facts, the Court could well have found that the failure to install the lining was not negligent, in light of the magnitude of the associated cost. Instead, the Court concluded that the lining decision, as part of a general feasibility decision, fell within the "discretionary" immunity. The Court thus indicated its sensitivity to government decisions explicitly based on monetary cost. Interestingly, given the facts of Ure, the cost in question would have been borne not by the government itself, but rather by the water users of the irrigation districts which the canal project provided with water.

F. Special California Rules: School Buildings.

The liability implications of school buildings that are not adequate as against the earthquake threat are incredibly complicated--and unfortunately very confused. These implications are generated by the Field Act (approved by the Legislature in 1933 as a consequence to the Long Beach earthquake), the many amendments of the Field Act in the many years since 1933, its recodification in 1977, and the complex interrelationship between the Field Act and the Tort Claims Act approved by the Legislature in 1963.

Under the Field Act, as amended, whenever a school board wishes to construct a new school building or alter or reconstruct a preexisting building in any monetarily significant way, the State Department of General Services "under the police power of the State shall supervise the construction" thereof. Education Code § 39140. Under § 39143, the General Services Department "shall pass upon and approve" all plans for any such construction project. Under § 39145, the school board is obligated to submit to the Department of General Services "full, complete, and accurate specifications and structural design computations" respecting the proposed construction project. Under § 39151, "from time to time, as the work of construction or alteration progresses and whenever the Department of General Services requires, the architect or engineer in charge of construction shall report to the department that construction is proceeding in full conformity with the approved plans and specifications."

The Act nowhere sets forth the construction standards which the Department of General Services is to apply in approving building construction; the establishment of such standards is committed to the discretion of the Department itself. The Department, through the Structural Safety Section of the Office of the State Architect, has essentially adopted the Uniform Building Code provisions; the standards are found in Title 21 of the Administrative Code.

In another recently added section of the Education Code, it is provided that no school building shall be constructed "on the trace of a geological fault" that is possibly active. § 39002.5. School boards are required to conduct a preconstruction geological study to insure compliance with the rule. Id.

How about buildings constructed prior to 1933? In 1967, the Legislature addressed this question, in amending and supplementing the Field Act. Under what is now § 39212 (part of the Garrison Act), the governing board of any school district which is using pre-1933 school buildings "shall have such buildings examined" by January 1, 1970; the examiner was to be either the Department of General Services or any licensed structural engineer or architect. Whenever the resulting report "shows that the building is unsafe for use, the governing board of the district shall immediately have prepared an estimate of the cost necessary" of either repairing or replacing

the building, so that the building as repaired or replaced "shall meet such standards of structural safety as are established in accordance with law." These standards are promulgated by the Department of General Services, § 39152, and are found in Title 21 of the Administrative Code. "Utilizing the information (thus) acquired...the governing board shall establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings."

With the information gained by the § 39212 survey, what does the board do? Under earlier law, it was required to make immediate expenditures for purposes of bringing the school buildings up to legal standards; and if funds were not available, the board was required to go to its electorate and seek referendum approval for additional funding. Under later legislation (which basically expired with the 1976-77 fiscal year) the legislature permitted school districts to impose a special tax override without referendum approval. Also, a program of state aid for pre-1933 schools was initiated in 1972.

Presently, the important section is § 39227. Under that section, no school building found unsafe for use under § 39212 can be continued in student use after June 30, 1975, unless specific approval is received from the State Allocation Board, and this approval cannot extent beyond 1977. In short: as of now--December 1978--all pre-1933 buildings used by students must comply with the Department's requirements. (I am told, however, that certain uncodified special laws have been passed by the legislature since 1975 exempting certain school buildings from this strong general requirement.)

What about public entity tort liability? The Field Act, standing alone, imposes no liability. It is therefore somewhat confusing to come across § 39225 of the Act, which stipulates that nothing in the Act "shall be construed as relieving any member of the governing board of a school district" of the liability it would otherwise bear. Under the next section (§ 39226), so long as the governing members comply with the Act, none of them can be liable in tort. The source of the tort claim for which this section provides a defense is, however, not identified.

Presumably the source of the claims to which §§ 39225-26 refer is the Tort Claims Act. Section 840.2 of that Act makes public employees personally liable for public property in a dangerous condition for which they are responsible by their "negligent or wrongful" acts. In a § 840.2 action, the Field Act could be relied on to establish that a school building is in a legally dangerous condition and that the school board members' action (or inaction) was "wrongful." Since, however, in any action under § 840 the school board member would be presumably entitled to indemnification from the public entity (see 43 Calif. Atty. Gen. Op. 209 (1964)), it is

unclear why this prospect of personal liability should have created concern among school board members or led to a flurry of activity on their part (as Prof. Van Alstyne has reported). (Of course, if the school board member has acted with fraud, corruption, or malice, indemnification is withheld; and perhaps the flurry of activity was occasioned by board members' fear that their disregard of statutory standards could lead to findings of "implied malice.")

In suits against the school board itself, the "mandatory duty" clause of the Tort Claims Act creates obvious prospects for liability. The mere post-1975 utilization by the school board of a substandard pre-1933 building is evidently in violation of a mandatory duty. Likewise, the school board's failure to comply with the Field Act would help establish public entity liability under §§ 835-835.4. See 47 Cal. Atty. Gen. Op. 163 (1966).

On the part of the General Services Department, its promulgation of earthquake standards seems clearly "discretionary" and hence immune. However, if it commits a mistake in approving the plans of a particular school building, then, given the narrowing of the "approval" immunity in Morris v. County of Marin, there is a possibility of liability. It is unclear whether the § 830.6 design immunity would be available to a public agency which approves plans for a building to be constructed by another public agency.

A different question is this:

What if the school building has satisfied either post-1933 or pre-1933 standards--yet the building still could be deemed unduly dangerous as against the earthquake risk? (I am told such a situation arose recently in Berkeley.) In such circumstances § 39226 provides the school-board member with defense in any actions against him personally. And the better view is that the public entity would also be immune. First, treating § 39226 as an employee "immunity," when an employee is immune, the public entity is immune as well. Government Code § 815.2(b). Second, the Field Act can be properly construed as a legislative specification of the standards for reasonably non-dangerous buildings under §§ 835-835.4. Given these standards, the public entity should therefore not be liable under §§ 835-835.4.

A. Seismic Safety Planning.

Subsequent to the 1971 San Fernando earthquake, California's planning law was amended so as to add a new required element in the general plans that all cities and counties are obliged to prepare. There shall be in such plans "a seismic safety element consisting of an identification and appraisal of seismic hazards such as susceptibility to surface ruptures from faulting, to ground shaking, to ground failures, or to the effects of seismically induced waves...." Government Code § 65302(f). California is the only state which so requires seismic safety planning. The 1973 advisory guidelines adopted by the California Council on Intergovernmental Relations indicate that "the seismic safety element contributes information on the comparative safety of using land for various purposes, types of structures, and occupancies. It provides primary policy inputs to the land use, housing, open space, circulation and safety elements." Under § 65302.2 of the Government Code, all local entities must adopt a seismic safety element for their general plan by December 31, 1976. As of January 1977, an investigation by the Seismic Safety Element Review Committee divulged that 20% of all cities and 19 out of 58 counties had not yet enacted a seismic safety element.

An initial liability question is: if a public entity has failed to adopt a seismic safety element, and if an earthquake then strikes, causing damage which might well have been preventable had such an element been adopted and enforced, can the victim sue the public entity for its failure to adopt an appropriately protective seismic safety element? While the Tort Claims Act provides a broad immunity for the failure to adopt any law, here we are concerned with a particular kind of law the adoption of which is mandated by a state statute. The legal question is: does public entity liability under the "mandatory duty" clause override the seemingly absolute immunity respecting the failure to adopt laws? This is a question for which as of yet there is no answer--although the implications of Morris v. County of Marin lean towards the affirmative. However, even if the answer is affirmative, it is doubtful that the victim could successfully recover. Even assuming the public entity has behaved tortiously in failing to adopt a seismic safety element, the victim would still have to show that this failure was the cause-in-fact and the proximate cause of the victim's damage. I.e., the victim will be required to demonstrate that if the public entity had adopted a proper seismic safety element, that element would necessarily have been effective in preventing the victim's damage. Public entities may be under an obligation to adopt some seismic safety element; but the contents of that element are largely unregulated by state law. As a result, the causation obstacle to this lawsuit would seem insuperable.

Rather, it would seem insuperable were it not for the possible implications of the California Supreme Court's decision in Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). In Haft, a state statute required hotel swimming pools either to provide a lifeguard or to

post a sign advising swimmers that no lifeguard is present. A father and his son both drowned in a lifeguard-less, sign-less hotel pool. Assuming the defendant had complied with the statute, compliance could have taken the form of either a lifeguard or a mere sign. Moreover, even had a lifeguard been present, it was unclear whether his presence would have prevented the drownings. (There was no direct evidence as to how the drownings occurred.) The Court found the lifeguard element the "primary" requirement of the statute, and partly for this reason affirmed liability. The Court also indicated that "although paucity of evidence in causation is normally one of the burdens that must be shouldered by a plaintiff in proving his case, the evidentiary void in the instant case results primarily from the defendant's failure to provide a lifeguard....The absence of such a lifeguard...deprived the present plaintiffs of a reason definitely establishing the facts leading to the drownings. (The absence of a lifeguard) greatly enhanced the chances (of injury, and) the available facts... strongly suggest (causation. Therefore) the burden of proof on the issue of causation should be shifted to defendants to absolve themselves if they can."

What all of this language means is unclear. But what it may mean is that when the defendant's tort consists of an omission or a failure to act when action is required by law, and when that failure itself creates genuine uncertainty about whether the plaintiff's injury would have been avoided had the action been undertaken, this uncertainty should be resolved in favor of the plaintiff. If Haft stands for so broad a proposition, it could take care of the causation problem in an action brought against a locality which has illegally failed to adopt any seismic safety element.

Now, consider the following situation. A public entity, complying with the law, adopts a seismic safety element which commits the public entity to certain course of action. The public entity then fails to implement that course of action. During an earthquake, damage occurs which would have been prevented had that seismic safety element been appropriately implemented. In these circumstances, can the victim sue the public entity? The public entity will of course invoke its § 818.2 immunities respecting the failure to adopt any law or the failure to enforce any law. The victim will seek to counter these immunity claims by invoking Morris on behalf of the idea that the mandatory duty clause takes precedence over the § 818.2 immunities.

B. Action Undertaken by Public Entities During and After an Earthquake.

The current version of the California Emergency Service Act was enacted by the state Legislature in 1970. It authorizes the Governor to declare a state of emergency, and to undertake a number of courses of action "for the mitigation of the effects of an emergency in this state." These courses of action are to be "in accordance with the state emergency plan." It is reasonably clear that the powers conferred on the Governor by Government Code § 8570 are of a "discretionary" nature, and that the state could therefore not be sued for the Governor's negligent failure to have exercised any of those powers should an earthquake in fact occur.

Once the Governor has actually declared an emergency, there are vested in him a large number of "emergency powers" under, for example, § 8572. Thus the Governor may "commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state," although in these circumstances the Governor "shall pay the reasonable value thereof." Under § 8586, "the Governor shall assign all or part of his powers and duties under this chapter to the Office of Emergency Services." Under § 8625, the Governor is "empowered to proclaim a state of emergency" when he finds that circumstances described in § 8558(b) "exist." That subsection defines a state of emergency in terms of the "existence of conditions of disaster or extreme peril caused by such conditions as air pollution...riot...or earthquake...." Clearly, the Governor can declare a state of emergency just after an earthquake or during an earthquake; he can also probably declare a state of emergency if an earthquake is sufficiently imminent so as to expose (in his judgment) the safety of persons and property to "extreme peril." Under § 8630, a "local emergency may be proclaimed only by the governing body of (a local government) or by an official so designated by ordinance adopted by such governing body." While § 8630 is not explicit on this, it can be assumed that the criteria for the declaration of an emergency at the local level are the same as the criteria at the state level.

Under § 8644, public entities are immune from any claim "based on the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of" the public entity or its employee during a declared emergency. This immunity provision seems largely irrelevant, since it does no more than restate the general "discretionary" immunity found in the California Tort Claims Act. Under § 8571, the Governor may "suspend" various state statutes if they would otherwise hinder the emergency effort. Such suspensions would eliminate what otherwise could be liability-producing "mandatory duties." More important is the immunity found in a 1971 amendment to Civil Code § 1714.5. "No disaster service worker who is performing disaster services ordered by lawful authorities during...a state of emergency...shall be liable for civil damages...resulting from any act or omission in the line of duty, except one that is willful." Given the § 1714.5 immunity of the disaster service worker, the public entity employing the disaster service worker would itself be immune from liability, given the provision on vicarious immunity in the Tort Claims Act (§ 815.2(b)). Undoubtedly, litigation would cluster around whether the workers' particular services were indeed "ordered."

Under § 1714.5, there is also immunity for injuries caused by any building used for mass care, first-aid, or other temporary purposes during a "natural emergency" or an earthquake. This immunity evidently overrides any liability that might otherwise flow from the §§ 830's sequence.

VI. SUMMARY AND APPLICATION

Through the 1950's, most American jurisdictions adhered to a traditional doctrine of governmental ("sovereign") immunity. This immunity precluded suits against local governments whenever the alleged tort arose in the course of a so-called "governmental function;" only if the locality was engaged in a "proprietary function" could it be liable in tort. During this traditional period, courts were inclined to say that states and (to some extent) counties were different from municipal corporations in the sense that all of their activities were automatically governmental; for courts adopting this view, the governmental/proprietary distinction resulted in the complete immunity of state and county governments.

Under the traditional rule of governmental immunity, local governments would face minimal tort-liability exposure in the event of an earthquake. There could be no liability, for example, for the issuance (or non-issuance) of earthquake warnings, since the provision of such warnings was plainly governmental; inspection and licensing activities being equally governmental, public entities could not be liable should a private building collapse during an earthquake. Under traditional law, whether there could be liability for the collapse of a public building during an earthquake would evidently depend upon whether a "governmental" or "proprietary" activity was taking place within that building. This certainly seems a strange line for the law to draw--and the growing recognition of strangenesses of this sort has worked to discredit the traditional doctrine in the eyes of judges and scholars.

There are still a substantial number of American jurisdictions which adhere to the traditional rule of governmental liability--although that number has tended to decline year by year. All the jurisdictions reviewed in this study have abandoned the traditional rule. New York State was in the vanguard: a 1929 statute waived the immunity of the state, and a 1945 judicial decision extended this waiver to local governments as well. The federal government enacted the Federal Tort Claims Act in 1946. In California, the Muskopf decision in 1961 professed to abrogate the general rule of governmental immunity. The Legislature intervened, however, and two years later passed a comprehensive and sophisticated tort claims statute. This statute establishes a general rule of public-entity "vicarious" liability, a number of areas of "direct" liability, and a collection of provisions dealing with liability and immunity in particular situations.

In 1961--the same year as Muskopf--the Washington Legislature enacted the first of several statutes gradually abolishing the general tort immunity of state and local governments in that jurisdiction. In 1962--the year after Muskopf--the Alaska Supreme Court discarded the immunity rule for local governments. This decision was accepted by the Alaska Legislature when, a year later, it enacted a statute establishing a general rule favoring liability--although carving out particular areas of immunity. (New immunities were added to the Alaskan statute in 1977.)

The abandonment of the traditional immunity rule does not mean, however, that local governments are liable in tort for every harm which the local government is somehow or other involved in. The victim must always show that the local government has engaged in conduct which would be tortious if committed by a private party; typically, what the victim must show is that the local government has been guilty of negligence. In the usual case, the victim will also be required to show that the negligence of the public entity was an actual cause of the harm which the victim has suffered. If the victim's complaint is that the public entity merely failed to intervene in a way that would have prevented the harm, the victim will encounter the general tort-law rule that there is no liability for omissions to act (however unreasonable they may be) which merely fail to prevent a harm from coming about. There are, however, a number of exceptions to this general rule of "no affirmative duty;" and the meaning of those exceptions in their applications to public entities bears in a major way on the liability exposure of public entities should an earthquake occur.

Apart from the general doctrines of ordinary private tort law--including negligence and no-affirmative duty--all the jurisdictions under study, even while abandoning the traditional immunity rule, have retained or established immunity in particular limited areas. In one way or another, all the jurisdictions have adopted the rule that public entities are immune for their "discretionary" acts, even though this discretion may be "abused" in a negligent way. The discretionary immunity is founded in large part upon the doctrine of separation of powers between co-equal branches of government, and in part upon the law's recognition that judges (and expecially juries) do not possess the competence to wisely review the correctness of certain governmental decisions and that it would be unseemly to allow juries to attempt to do so. The different jurisdictions have defined "discretionary" in a variety of ways. Often the test is stated in terms of "planning" versus "operational" acts. If the decision which is allegedly tortious has occurred at the planning level, it will clearly be regarded as discretionary, while if it occurs at the operational level, there is a tendency to regard it as nondiscretionary. A close review of the case law reveals, however, that many governmental acts that seem clearly operational--for example, a judge's decision to suspend a criminal sentence--will, despite their operational character, be regarded as "discretionary" and hence immune by virtue of their uniquely governmental character.

The main body of this report has reviewed the general areas of governmental liability/immunity law which seem the most relevant in the event of an earthquake. Section II concluded that for "discretionary" reasons there is little likelihood of pubic entities being held liable for their mistaken issuance of an earthquake warning, and even less likelihood of liability for their negligent failure to issue an earthquake warning. The "discretionary" immunity would seem to protect both kinds of mistakes, while the doctrine of no-affirmative-duty would make the failure-to-warn

claim especially fruitless. If, however, the warning was mistakenly issued because of low-level negligence in gathering or evaluating information, the chances of liability go up somewhat.

Section III considered the possibility of liability for harm caused by the earthquake collapse of a private building. This is an issue which has sharply divided the courts in many states. Sunbelt jurisdictions like Arizona, Florida, and Louisiana have adopted a strong pro-immunity rule. The Wisconsin Supreme Court has deftly postponed decision on this issue. New York courts have been wrestling ambivalently with building-code/inspection issues for several decades; the results have tended to be pro-immunity, although there are pockets of anti-immunity holdings whose boundaries are difficult to discern.

The Alaska Supreme Court has suggested that the "discretionary" immunity would prevent liability for a negligent failure to conduct an inspection in the first place. But that Court has also sought to impose liability for the negligent conduct of an actual inspection and for the negligent failure to follow-up on the results of an actual inspection. However, the Court's pro-liability rulings were negated by the action of the Alaska Legislature. More precisely, the Legislature has established an immunity rule for local governments while leaving unamended the Court's holding concerning the liability of the state.

The recent decision by the California Supreme Court in Morris v. County of Marin provides the basis for an understanding of the liability potential under California law. The "license" and "permit" immunity in the California Act, though seemingly absolute, has been interpreted in Morris as applying only to situations in which the license or permit decision was "discretionary." For such a decision to be discretionary, the local decision-maker must at least have some range of legal choice as to whether or not the license or permit should be issued. The Uniform Building Code, as essentially adopted by Los Angeles area cities and counties and also by the State Housing Law, contains important provisions on earthquake safety. If a local government issues a building permit to a building whose plans failed to comply with the Code's requirements, California law makes it reasonably clear that the local government could be liable in the event of earthquake damage caused by the building's substandard condition. ABAG field studies, however, have revealed little concern about this area of liability. Perhaps local governments are generally confident that not many errors have occurred in assessing building plans' compliance with the Building Code. (Whether this confidence is warranted is not easy to say.) Under Morris it is unclear whether the "inspection" immunity (as contrasted to the "permit" immunity) would block liability if a certificate of occupancy were improperly issued to a building owner as a result of a building inspection which negligently overlooks a codal violation.

The above has been a rather general recapitulation of the law in several jurisdictions. ABAG's field studies, most of them in California, have uncovered the existence of a number of core problems of local-government earthquake liability. In order to render this report's general evaluations more concrete, it might be helpful to deal specifically with a number of these core problems, and to deal specifically with them in accordance with the law of a single jurisdiction, California.

An introductory point is that while the California Act contains a number of immunities, there has been a strong trend in the California Supreme Court opinions to interpret these immunities narrowly. (It is standard city attorney practice to refer to the "erosion" of the immunities.) Important cases illustrating and documenting this trend includes Johnson, Baldwin, and Morris. At least some of these decisions have surprised neutral legal scholars: thus Baldwin evidently surprised Professor Van Alystyne, and Morris certainly surprised me. (Baldwin came down one year before my time.) The process of "immunity erosion" then can be regarded as an important tendency in California law. But it would be a mistake to overrate its importance for ABAG's earthquake purposes. For one thing, even during the "erosion" decade, many immunities have survived just fine; thus the Morris decision, while curtailing the license and permit immunity, affirmed the inspection immunity in very broad terms, and placed only a small cloud over the enactment-adoption immunity.

Also, the Court's personnel has been substantially revamped. One of the new faces, Justice Clark, essentially dissented in Morris. Justice Richardson has taken a "conservative" view in certain major private tort-law cases. Justice Manuel likewise seems to be a conservative on tort-law matters. Justice Newman is an uncertainty. One would expect that Chief Justice Bird, as an ex-state cabinet member, will not be unsympathetic to excessive-cost arguments which public-entity defendants could assert.

Finally, a serious earthquake could easily wrench departures from whatever the previous tendencies may have been. Even a judge who is generally inclined to require government to absorb certain accident costs could be led to reconsider his views after a severe earthquake--an earthquake perhaps producing thousands of serious injuries and perhaps imposing enormous special burdens of all sorts on state and local governments.

For all these reasons, in giving consideration to ABAG's core problems, I am dubious about the value of ascribing great importance to the Supreme Court's (until-now) tendency of interpreting the immunities in a seemingly narrow way.

A. One of these core problems is, according to ABAG, an especially conspicuous one; it will therefore be dealt with here at moderate length. Assume that a local government knows, by virtue of a general survey, that one of its public facilities would entail a great hazard in the event of a moderate earthquake--either because of the facility's design inadequacy

or its geological setting. The possibility of an earthquake over the long run cannot be contradicted. If the local government takes no action and if a moderate earthquake then occurs and results in many deaths, could the local government be held liable? If a tort suit were brought, the issues in that suit can be described in the following sequential way.

1. The victim would need to show that the danger posed was "substantial" rather than "trivial."

2. The victim would also need to show that the public entity had actual or "constructive" knowledge of this danger.

3. The public entity could escape liability if it could show that its failure to act was a "reasonable" failure. The public entity will argue that budgetary constraints are relevant to the reasonableness question.

4. The public entity will further argue that even if its inaction was unreasonable, the design of the building is protected by the design-immunity provision of the California Act.

5. The victim will argue that the defendant's recently-acquired knowledge of the building's hazardous situation is a "changed condition" which displaces the design immunity.

6. If the victim is successful in his changed condition argument, the public entity will then argue that once its new knowledge was attained, a considered decision was arrived at to retain the status quo. The public entity will argue that this "inaction decision" is protected by the design immunity.

7. The victim will counter with the argument that the local government's inaction decision was not supported by "substantial evidence."

8. In addition to everything in 1-7 above, the victim will argue that the public entity should at least have posted warnings of the public building's earthquake hazard.

9. The public entity will reply that such warnings were not required or (10) would not have dissuaded the plaintiff from entering the building and hence suffering his injury.

These stages in the argument can now be examined one by one.

1. To set the stage for liability under the Tort Claims Act, the plaintiff must show that public property was in a "dangerous" condition: the statute distinguishes between "substantial" and "trivial" dangers. The public entity will perhaps argue that since the risk of an earthquake is very low, the danger is a trivial one. The plaintiff will respond that while the probability of an earthquake may be low, it cannot be disparaged

as insignificant; the plaintiff will also argue that should the risk materialize--i.e., should an earthquake occur--the magnitude of the resulting harm could be enormous. Based on these arguments, the plaintiff would almost certainly persuade a jury that the danger is a non-trivial one.

2. Under the Act, the plaintiff must show that the public entity either knew or should have known of the hazard in question. The core case described above explicitly assumed a study on the locality's part which had revealed the hazard. This assumption satisfies the actual knowledge requirement.

3. Even if it concedes the existence of public property in a dangerous condition, the public entity can exempt itself from liability if it can show that its failure to act to reduce or eliminate that danger was "reasonable" within the sense of §835.4(b). Under the terms of that subsection, whether a failure to act is reasonable depends on a comparison of the risk of injuries which inaction would allow with the practicality and cost of taking risk-prevention steps. At this point it becomes relevant to ask exactly what the danger in the public facility is. If the public building merely includes a parapet that is likely to fall in the event of an earthquake, this parapet can be easily and inexpensively removed; in these circumstances, the failure to act would be almost certainly unreasonable. But now assume that the entire building is of unreinforced pre-1933 vintage and that the only method of eliminating the hazard is to abandon the building entirely. Whether the failure to abandon would be described "reasonable" is obviously a very "heavy" question. The risk of remaining in that particular location may be quite high--although its exact measure may be the subject of bitter debate between the plaintiff and the defendant public-entity. The practicality and cost of relocating may also be quite high--and equally subject to debate. This cost may of course vary in accordance with the nature of the public facility; a hospital is obviously more difficult to relocate than a mere office building.

   What if the public entity alleges not only that the monetary cost of relocation was high, but also that there were insufficient funds in the local treasure to defray this cost? As a general matter, tort law stipulates that its "reasonableness" obligation is imposed on all parties equally, without regard to whether they happen to be rich or poor. Should this stipulation be applied to public entities? The case law has discussed the relevance of public-entity budgetary constraints and budgetary priorities mainly in the context of "discretionary" immunity. A few cases, like

Abbott in Alaska, have denied that these constraints are legally relevant. Other cases, including Ure at the federal level and Riss in New York, have been willing to take budgetary realities into account. Given the specific reference to "practicality" in the California Act and given the inevitability of budgetary limits in this Proposition-13 era, a California court would probably conclude that the limitations on a public entity's revenue base can be appropriately considered in assessing the "reasonableness" of the local government's inaction.

In any event, the comparison of risk to the practicality and cost of relocation will almost certainly be a question that yields no unequivocal answer. Therefore, under the ordinary rules of allocation of function between judge and jury, the matter would be submitted to the jury under appropriate instructions.

4. The public-entity defendant, however, will seek to keep the case from the jury by invoking the "design immunity" afforded by §830.6 (an immunity which is based on an earlier precedent in the New York case law). Under that section, if an injury results from a public-facility design decision rendered by an appropriate public official, the court is required to rule against liability unless there is no substantial evidence supporting the original design decision.

5. The plaintiff, however, will protest the invocation of §803.6, arguing that the section's application is displaced by the fact that "circumstances" have "changed" since the time of the original design decision. Here the plaintiff would be relying on the "changed circumstance" doctrine enunciated in Baldwin v. State. Whether the mere acquisition of "new knowledge" of a danger which itself was present from the very beginning is a "changed circumstance" within the sense of Baldwin is a question for which neither Baldwin nor the few post-Baldwin cases have provided an answer. But given the basic Baldwin logic, it would appear that new knowledge should be deemed a changed circumstance.

6. Even if the plaintiff wins, however, on the existence of changed circumstances, the defendant public entity has a possible counter. It may be the case that the public entity, armed with its new knowledge, has considered, in an on-the-record way, whether a change in location is in fact feasible. If such a consideration has been given and has led to a documented conclusion that the public facility should be allowed to remain as is, the public-entity defendant will argue that the design immunity section--exactly as that section's purposes are divined in Baldwin--should be deemed applicable to this new inaction decision. The legal correctness of this pro-public-entity argument is uncertain; but my reading of Baldwin would incline me to rule in its favor.

7. Even if such a ruling is made, however, the plaintiff has not necessarily lost his case. For §830.6 constitutes a "rule of deference" rather than an outright rule of immunity. Liability can still exist if the public entity's design decision is lacking in "substantial evidence" showing its reasonableness.

   If the public entity's process of considering the relocation possibility has been clearly perfunctory in nature, the plaintiff would stand a good chance of persuading the jury that this pro-forma consideration does not deserve the protection of §830.6.

8. In addition to the relocation argument spelled out above, the victim will also argue that the public entity should at least have posted warnings of the public facility's earthquake danger. Cameron establishes the general idea of an obligation to warn, an obligation unaffected by the design immunity doctrine.

9. The public entity will first reply that any warnings would be so general and usually so fruitless as to fall outside of the Cameron warning obligation. How many people would alter their conduct in response to such a warning?

10. The public entity will further argue that the victim needs to prove, on the causation issue, that he would in fact have declined to enter the building had a warning been posted. The defendant will argue that cases like Haft place the burden of proof on the public entity to establish that a warning would not have dissuaded the victim. Here, the victim's own situation may be relevant. Is he, for example, an employee assigned to work in the building, or is he instead a person merely entering the building for a rather ephemeral reason? And even without a posted warning, what knowledge did the person have of the building's earthquake danger?

In sum and short: cases of this sort involve a labyrinth of legal arguments. Any effort to quantify the liability exposure of public entities in public building cases is bound to be simplistic and misleading.

B. While public-building-relocation is the most acute of the core problems uncovered by ABAG, other core problems are certainly deserving of mention. One such problem assumes that a local government is aware that there are many parapets or building ornaments on its older buildings which will fall to the streets or sidewalks if there is a moderate earthquake; the local government takes no steps to mitigate this hazard, and an earthquake occurs in which the parapets fall and cause death or serious injury.

This core case, too, when looked at carefully, reveals a labyrinth. First of all, insofar as the ornament extending from a private building results in a danger to persons traveling on adjacent public property, a public entity could be sued for public property in a dangerous condition: the references to "adjacent property" in the Tort Claims Act leave open the idea that public property can be "dangerous" because of such a private-property overhang. The difficult question involves the "reasonableness" defense: what is it that the local government can reasonably do to minimize a hazard of this sort? At the very least, the local goverment can post warnings, or can modify public property so as to minimize the hazard caused by the private property overhang; that is, it can rope or fence off that part of the public right-of-way that is subject to the parapet danger. See Shea v. City of San Bernardino, 7 Cal. 2d 688, 62 P.2d 365 (1936). The harder question is whether, in addition to such modifications, the obligation to take "reasonable" steps includes an obligation to enact an ordinance which in one way or another requires the private landowner to remove the parapet. Here, the argument for liability under the public-property provisions of the Act comes into seeming conflict with the Act's strong immunity for the "failure to adopt an enactment."

Consider now the general danger caused by private-building parapets (forgetting about any possible adjacent-public-property "angle"). If the only complaint against the local government is that, knowing of the danger, it should have adopted an anti-parapet policy and failed to do so, this complaint would be eliminated by the law-adoption immunity. Whatever one may think of the general moral obligation of a local government to enact earthquake-protecting laws, this moral obligation is given no recognition by the Act; the enactment-adoption immunity is a clear bar to exactly this form of tort complaint. (The importance of this immunity can hardly be underestimated: the immunity will resurface many times in the discussion of other core problems.) Moreover, the failure to adopt an anti-parapet immunity would seem clearly "discretionary" and hence immune, at least so long as policy-makers did in fact think about the parapet danger in declining to adopt a policy. Finally, there is no tort-law affirmative duty obliging local governments to prevent the harm caused by private-building parapets. Here--as elsewhere--the "discretionary" immunity and the no-affirmative-duty doctrine reinforce--and to a large extent explain--the "enactment adoption" immunity.

What if, however, the local government has in fact adopted some kind of anti-parapet ordinance? Here the liability implications would depend, in part, on the exact terms of the ordinance. What if the ordinance simply required private landowners to remove dangerous parapets? If the landowners failed to comply and if a private person is ultimately injured, that person could of course sue the landowner, relying on the latter's violation of the ordinance as establishing negligence per se. Could the victim also sue the public entity for failing to fully enforce its ordinance? Here the public entity would assert the "law-enforcement" immunity which is set forth in §818.2 of the California Act. The victim, however, could correctly point out that this immunity has been limited by the Morris case to law-enforcement failures which are "discretionary." Since no one really knows what "discretionary" means in this Morris law-enforcement context, it is difficult to predict how successful the victim's argument would be.

The discussion up until now has assumed an ordinance which, in terms, simply imposes an obligation upon private parties. What if the ordinance also contains language which orders appropriate public officials to insure that the ordinance is compiled with? For such an ordinance, the meaning of Morris is rather clear: liability can be imposed under the mandatory duty clause, and mandatory-duty liability takes precedence over whatever immunity is afforded for law enforcement. But there is some uncertainty as to whether a mandatory-duty can be "self-inflicted"--i.e., imposed on a local government by itself. (The case law so far, while hardly decisive, has been sympathetic to the idea of self-inflicted mandatory duties.) Moreover, the public entity can always assert a "reasonable diligence" defense to a mandatory duty claim, if its incomplete enforcement occurred in a "reasonable" way.

The San Francisco ordinance which has made us all aware of the parapet problem is one which stands between the two hypothetical ordinances described above. Under §2.51 of Article 2.5 of the San Francisco Building Code, every parapet creating a possible hazard is "subject to inspection" by public authorities. Under § 2.53, if an inspection is conducted and if the inspection "determines" that the parapet falls below legal norms, the relevant public official "shall" order the private property owner to take appropriate steps to remove the parapet or the otherwise reduce the hazard. Clearly, § 2.51 imposes legal obligations on the landowner only after an inspection has determined that an inappropriate danger exists. Moreover, the "subject to inspection" language in § 2.51 fails to impose any mandatory duties upon public officials. Only after an inspection uncovers a danger does § 2.53 use "shall" language with respect to public officials' law-enforcement obligations; liability could exist, therefore, only for a unreasonable failure to "follow up" after an actual inspection.

C. Another core case uncovered by ABAG concerns dangerous private buildings of a pre-1933 unreinforced masonry sort. It is assured that the local government knows about numerous high-occupancy buildings of this sort, and also knows that they are located in high seismic-risk areas. The local government does nothing, and an earthquake produces disastrous results.

Here again, the enactment-adoption immunity has an important application. If the victim's only complaint is that the local government, knowing of the hazard, has failed to enact an appropriate law or adopt an appropriate policy to deal with that hazard, that complaint would be barred by the § 818.2 immunity. But now change the facts somewhat, and assume that the local government has enacted an ordinance requiring the posting of notices on such buildings. The victim's claim could now be that this policy, while not insignificant, is not strong enough: the locality should have adopted a policy more meaningful than merely requiring warnings. But this claim would likewise be thwarted by the enactment-adoption immunity. No matter how specific a local government's knowledge of the earthquake hazard and no matter how thorough its survey or how complete its inventory, the immunity would still seem applicable.

D. Another cluster of core cases uncovered by ABAG concerns actions taken or not taken pursuant to a state certified earthquake prediction. Actions not taken could include the failure to close down a toxic chemical plant, which, after an earthquake, develops a lethal chlorine gas leak. It is doubtful that liability would exist in such a case. First, absent further information this would appear to be a situation of the local government's failure to adopt an enactment, a failure which is again immunized by the California Act. Secondly, the high-level decision that the plant should not be ordered closed would almost certainly qualify as a "basic policy decision" covered by the "discretionary" immunity in the California Act; all the public entity would need to show is that a decision was rendered which adverted the relevant risk. Finally, absent further facts, the mere failure to take action to close down a plant involves an affirmative duty, and absent further facts no basis for an affirmative duty exists.

What if the local government fails to evacuate a flood plain and many are killed when the dam fails? If the dam is owned by a local government a potential for liability can be found in the public property provisions of the California Act: Cameron v. State would seemingly require the local government at least to warn the residents of the plain of the dam's pending collapse. More substantial possibilities for liability are created by the new Government Code provision requiring certain local governments to prepare evacuation plans. If a locality has defaulted on its obligation to prepare such a plan, it would be subject to mandatory-duty liability. This liability would be complicated, however, by a difficult question of cause-in-fact: would the existence of a minimally lawful evacuation plan really have prevented the victim's injury? Here the Supreme Court's Haft decision might assist the plaintiff, insofar as Haft suggests that when a defendant has omitted to undertake required safety conduct, doubts on the causation issue should be resolved against the defendant. If the locality secures the approval of its plan but then fails to carry out one of the plan's included "elements," one needs to know whether the element was expressed in obligatory rather than goal-oriented terms. If the former, and if the local government has not shown "reasonable diligence" in its failure to honor this "element," a strong chance of mandatory-duty liability would be present. However, one also needs to know whether or not the plan is "self-executing"--that is, whether it doesn't (or does) require implementation by appropriate local ordinances? If ordinance implementation is required, a difficult question emerges as to the relationship between mandatory-duty liability and enactment-adoption immunity. (Both of these immunities are written in absolute terms.)

E. Another core case revealed by the ABAG study concerns local government's discovery, through a study, that its emergency systems would not be adequate or functional in a moderate-to-large earthquake. The local government takes no steps, and in the subsequent earthquake the inadequacy of the emergency systems leads to the loss of life. Once again, the enactment-adoption immunity, the discretionary immunity, and the no affirmative-duty doctrine of ordinary tort law provide a trio of reasons for denying liability. One can imagine the non-ordinary case, however, where circumstances would exist negating one or more of these

reasons. What if the local government has made statements to the public commiting itself to providing a high level of emergency services in the event of an earthquake? If individuals can show that they have significantly relied on this commitment (this of course is a big "if"), then a basis could exist for a affirmative duty. Would, however, recognition of a tort law affirmative duty somehow or other take precedence over the enactment-adoption immunity? This is, in lawyer's language, an open question.

California law now requires that local governments adopt a disaster plan, by way of the required seismic safety element in localities' general plans. If a locality was failed to adopt a seismic safety element, it has neglected a mandatory duty. But since the victim would be hard-pressed to show that the mere existence of a seismic safety element would have prevented his injury, it is questionable whether this failure would entail liability. On this causation question, however, the victim could again seek to rely on the implications of Haft.

What if the local government commits itself, in its seismic safety element, to a disaster plan which it then fails to carry out? Here causation could be easy enough to prove. But now it is no longer clear that the mandatory-duty clause justifies liability. For one thing, the locality's seismic safety element may use general "goal-oriented" language that falls short of imposing anything that the law would regard as a "duty." Secondly, the question again arises as to whether a mandatory duty can be self-inflicted. Finally, once again there is a possible conflict between mandatory-duty liability and enactment-adoption immunity.

F. The final core problem uncovered by ABAG concerns local governments which "allow" development--particularly high-rise development--on locations which the local governments know or have reason to know are seismically hazardous. Insofar as the victims' tort complaint would relate to the localities' failure to adopt some allegedly desirable policy, there are basic elements here of the enactment-adoption immunity, the discretionary immunity, and the no-affirmative-duty doctrine which would seemingly bar a tort claim.

Local governments, of course, give building permits and certificates of occupancy to new buildings. What are the land-use implications of this? Through its 1973 edition, the Uniform Building Code ignored land use and soil conditions in its earthquake safety provisions. For a locality adopting this Code, the issuing of a permit to a structure whose land use was seismically hazardous was in no way in violation of the Building Code.

However, in its 1976 edition, the UBC has now included a soil-condition seismic safety factor. For a locality which has adopted the Code's 1976 edition, a permit issued without considering land use could be improper under the Code. Since, under Morris, the permit immunity has been narrowed, a substantial chance for liability arises. In considering

soil conditions so as to ascertain building-code compliance, the locality will generally rely on the report of the geological engineer employed by the permit applicant; the UBC seemingly condones this process of reliance. Assuming the plaintiff must prove an "unreasonable" as well as merely objectively mistaken permit issuance, a difficult question arises as to the meaning of "unreasonableness" in this context.

The Alquist-Priolo Act contains important limitations on building projects which local governments may allow in the vicinity of a known earthquake fault. A locality's neglect of Alquist-Priolo, or of regulations validly promulgated thereunder, could easily lead to "mandatory duty" liability. Many localities, like Los Angeles County, have in essence incorporated Alquist-Priolo into their own building codes; some, like Los Angeles County may have expanded on Alquist-Priolo in those building codes. Since the operative terms of Alquist-Priolo (and other laws of this type) can often be applied rather mechanically, objective errors in issuing permits in violation of such laws are likely to be negligent or unreasonable and hence tortious.

As this report closes, the report can come full circle by returning to a theme first announced in the Introduction: an earthquake-combined with aggressive and intelligent plaintiffs' lawyers--could engender an almost boundaryless diversity of tort theories. Moreover, each of these theories, analyzed fully, could easily occupy a 50-page legal brief. The more detailed the legal argument, the more nearly accurate the argument becomes; yet the greater the detail, the more difficult the argument may be for the layman to follow. This report has highlighted those classes of earthquake tort claims which--at this anticipatory point in time--seem the most likely to ensue, and it has summarized the legal arguments which would surround those claims. More generally, it has set forth the larger legal framework within which these claims--and other claims as well--can be analyzed and understood.

As discussed the Legal Background Report, the California Tort Claims Act contains seemingly absolute immunities for both (1) the failure to adopt any enactment and (2) the failure to enforce any enactment once adopted. However, in Morris v. County of Marin, the Supreme Court, while seemingly leaving untouched the absolute enactment-adoption immunity, narrowed the law-enforcement immunity to situations where the law-enforcement decision is "discretionary." It is quite unclear what "discretionary" means in this context. If it means "basic policy decision" (see Johnson v. State) then only a small number of "high-level" law-enforcement decisions remain immune; but if "discretion" merely means that some range of legal choice is available to the law-enforcer, then the immunity may remain rather broad. (Another question is whether proving "discretionary" for Morris purposes requires a showing that the relevant risks were indeed adverted to by the law-enforcement officer; see again the Johnson case.)

In any event, after Morris there is an evidently absolute immunity for failing to adopt an ordinance, but only a qualified immunity for failing to enforce an ordinance after its enactment. This immunity differential attaches considerable significance to the existence of any ordinances which have indeed been enacted by local governments--since their non-enforcement could result in liability. Subsequent to the submission of the Legal Background Report, my attention has been called to a few relevant laws and ordinances which have significance, and which may affect the analysis in the Legal Background Report at pp.78.

1. Section 3479 of the California Civil Code defines "nuisance" in very broad indeed almost promiscuous, terms. Meanwhile, § 731 of the state's Code of Civil Procedure gives cities the power to "abate public nuisances." The nuisance issue is discussed in the context of the Bakersfield case below.

2. While it is generally true, as reported, that building codes basically apply prospectively and to new construction, it turns out that building codes often contain provisions that have some application to "old" buildings which have already been constructed before the building code's enactment (or amendment).

   a. The San Francisco Building Code's provisions on parapets has been discussed in the Legal Background Report at p.167. The City of Los Angeles' Building Code contains provisions on "parapets and appendages" that seem even stronger than the San Francisco provisions. Under § 91. 0103(b):

      > No building shall have any parapet or appendage attached to or supported by an exterior wall of the building and located adjacent to a public way or to a way set apart for exit from the building or passage of pedestrians, if such parapet or appendage is not so adequately constructed, anchored or braced as to remain wholly in its original position in event of an earthquake having the effect designated by Division 23 of this Code.

> Whenever the Department determines by inspections that an existing parapet or appendage is not so adequately constructed, ... the Superintendent of Buildings shall, by written notice addressed to the owner, person or agent in control of the building, ... direct that the necessary corrections be made.... Upon receipt of such notice, the owner, person or agent in control of the building... shall, within one year from the date of such notice complete all the work necessary or ordered.

This Los Angeles codal provision seems more conducive to tort liability than the San Francisco ordinance, insofar as Los Angeles' provision's "shall" language seemingly leaves law-enforcement officers with less Morris "discretion" than they possess under the San Francisco ordinance.

b. I am advised that the City of Long Beach has adopted by ordinance a strong building-code section requiring the improvement of pre-1934 buildings of unreinforced masonry. Given this strong ordinance (which Long Beach officials tell me has previously been sent to ABAG), insofar as Long Beach's enforcement of the ordinance is negligently incomplete, it subjects itself to possible Morris liability.

c. The Uniform Building Code itself contains a section (203) which concerns unsafe existing buildings. The syntax of this section makes it very difficult to parse; it is impossible to ascertain with certainty which clauses modify which. This section is set forth below.

> All buildings or structures which are structurally unsafe or not provided with adequate egress, or which constitute a fire hazard, or are otherwise dangerous to human life, or which in relation to existing use constitute a hazard to safety or health, or public welfare, by reason of inadequate maintenance, dilapidation, obsolescence, fire hazard, disaster damage, or abandonment, as specified in this Code or any other effective ordinance, are, for the purpose of this Section, unsafe buildings. All such unsafe buildings are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition, or removal in accordance with the procedure specified in Chapters 4 through 9 of the Uniform Code for the Abatement of Dangerous Buildings or by any other procedures provided by law.

d. There is indeed a Uniform Code for the Abatement of Dangerous Buildings prepared (like the Uniform Building Code itself) by the National Conference of Building Officials. This Code

(which appears not to have been widely adopted by California localities) provides some specificity to the "unsafe building" concept set forth in the Uniform Building Code itself. Under § 302(2) of the Dangerous Building Code, a building is dangerous

> ...whenever the stress in any materials, member or portion thereof, due to all dead and live loads, is more than one and one-half times the working stress or stresses allowed in the Uniform Building Code for new buildings of similar structure, purpose or location.

e. The City of Los Angeles, while it has not adopted the Dangerous Building Code, has included a provision in the Los Angeles Building Code which resembles the quoted provision in the Dangerous Building Code. According to § 91.0103 (a) of the Los Angeles Code:

> Any portion of any building or structure which is a hazard to life or property as a result of deterioration or for any other cause, shall be brought up to a reasonable condition of stability and safety, or shall be made to conform to the regulations of this Code, or shall be demolished.
>
> A building or portion shall be presumed to be a hazard to life or property if any of the following conditions exist: (1) when the stresses in any member, computed on the basis of the load specified in this Code, exceed twice the working stresses permitted by this Code (emphasis added.)

f. The provisions in the Los Angeles County Building Code are similar to those in the Uniform Building Code--but also contain their own twists. Under § 203(a) of the County Code:

> All buildings or structures which are structurally unsafe or not provided with adequate egress or which constitute a fire hazard or are otherwise dangerous to human life or which in relation to existing use constitute a hazard to safety or health or public welfare, by reason of inadequate maintenance, dilapidation, obsolescence, fire hazard, disaster damage, or abandonment as specified in this Code or any other effective ordinance, are, for the purpose of this chapter, unsafe buildings. Whenever the County Engineer determines by inspection that a building or structure whether structurally damaged or not is dangerous to human life by reason of being located in an area which is unsafe due to hazard from landslide, settlement or slippage or any other cause, such building shall for the purpose of this chapter, be considered an unsafe building.

> All such unsafe buildings are hereby declared to be public nuisances and shall be abated by repair, rehabilitation, demolition or removal in accordance with the procedure specified in this chapter.

If our principal concern is whether, properly interpreted, the provisions of the UBC, the City Code, and the County Code render illegal pre-1934 buildings of unreinforced masonry, the answer must be an emphatic "maybe." There are any number of ambiguities. One concerns whether the Code really illegalizes all "unsafe buildings," or only those buildings that are unsafe in the sense of violating one of the Code's more specific provisions. Another ambiguity arises from the fact that existing codes do not all deal with new buildings of reinforced masonry and their permitted stresses; in these circumstances what is the "base figure" to be used in the x1½ and x2 calculations?

Administratively, I can report that these building code proposals have not been interpreted by local law enforcement or building department officials as outlawing "unsafe buildings" generally; such officials assume they need a more specific mandate before they can "go after" pre-1934 buildings. "Discretion" may (or may not) exist in the city officials' understanding of what these local laws mean, and also in the city officials' understanding of what the appropriate shape of a law enforcement should be. But the fact remains that after Morris, any person injured by an "unsafe building" has a possible tort argument.

There is one California Supreme Court opinion of relevance: City of Bakersfield v. Miller, 64 Cal. 2d 93, 410 P.2d 393, 48 Cal. Rptr. 889 (1966). This case dealt with certain "retroactive" provisions in the Building Code adopted by Bakersfield in 1959. Under one provision of this Building Code, non-minor violations of these retroactivity rules which seriously endanger safety are deemed public nuisances. The city brought an action to require a hotel constructed in the downtown area in 1929 to meet the Code's retroactive standards--or, in the alternative, to at least install an approved automatic sprinkler system. The cost of full compliance evidently would have reached $195,000; the cost of the sprinkler system would have approximated $55,000. The hotel itself was worth more than $250,000; and evidently the installation of a sprinkler system would have increased the hotel's resale value at least somewhat. The chief issue in Bakersfield was simply whether the city had the legal authority to apply its safety laws in this "retroactive" fashion. The California Supreme Court answered this question in the affirmative, given the case's particular facts. The Court recognized, however, that in other situations the burden of retroactive compliance might be so "onerous" in a monetary sense as to render a retroactive requirement unconstitutional. (It is typical for local land-use laws to exempt preexisting "nonconforming uses," and it is often thought that this exemption has a constitutional basis.)

The Bakersfield opinion, concerned as it is simply with the question of local government power, obviously has no direct bearing on the question of any local government obligation which could be enforceable in tort.

Still the opinion adverts to both Civil Code § 3479, broadly defining "nuisance," and Code of Civil Procedure § 731, vesting cities with the power to abate "public nuisances." An aggressive lawyer could argue that a pre-1934 building of unreinforced masonry is a nuisance and that a city's unreasonable failure to exercise its power to abate this nuisance amounts to a negligent failure to enforce the nuisance statute and hence justifies liability under Morris. But this argument, standing alone, would probably fail. First, § 731 confers only a power, not an obligation. Secondly, Bakersfield was willing to conclude that the hotel constituted a nuisance within the sense of § 3479 only because the building had been effectively declared a nuisance in the city's own Building Code; absent the Code, it is very unlikely that the Court would have concluded that the building independently violated the § 3479 nuisance statute. As noted, however, many building codes do contain "public nuisance" language. Bakersfield thus gives the victim's lawyer some chance to argue that the local government's failure to take action against an "unsafe building" is a failure to enforce the local building code and the state nuisance statutes in combination.

PART-2

Key statutes and cases

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

CLAIMS AND ACTIONS AGAINST THE STATE AND PUBLIC EMPLOYEES

General

Const. Art. III

Const. Art. III, Sec. 5. Suits may be brought against the state in such manner and in such courts as shall be directed by law.

General Procedure

C.C.P. 313. The general procedure for the presentation of claims as a prerequisite to commencement of actions for money or damages against the State of California, counties, cities, cities and counties, districts, local authorities, and other political subdivisions of the State, and against the officers, employees, and servants thereof, is prescribed by Division 3.6 (commencing with Section 810) of Title 1 of the Government Code.

Time Limits

C.C.P. 342. An action against a public entity upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of Division 3.6 of Title 1 of the Government Code must be commenced within the time provided in Section 945.6 of the Government Code.

Accrual of Cause of Action

C.C.P. 352. (a) If a person entitled to bring an action, mentioned in Chapter 3 of this title, be, at the time the cause of action accrued, either:

1. Under the age of majority; or,
2. Insane; or,
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than for life;

the time of such disability is not a part of the time limited for the commencement of the action.

(b) This section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) or Chapter 2 (commencing with Section 910) of Part 3, or Chapter 3 (commencing with Section 950) of Part 4, of Division 3.6 of Title 1 of the Government Code. This subdivision shall not apply to any claim presented to a public entity prior to January 1, 1971.

Nuisance

C.C. 3479. Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway is a nuisance.

VEHICLE CODE PROVISIONS RE LIABILITY

DIVISION 9. CIVIL LIABILITY

CHAPTER 1, ARTICLE 1. PUBLIC AGENCIES

Definitions

V.C. 17000. As used in this chapter:

(a) "Employee" includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor.

(b) "Employment" includes office or employment.

(c) "Public entity" includes the state, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the state.

Liability of Public Entity

V.C. 17001. A public entity is liable for death or injury to person or property proximately caused by a negligent or wrongful act or omission in the operation of any motor vehicle by an employee of the public entity acting within the scope of his employment.

Liability of Public Entity

V.C. 17002. Subject to Article 4 (commencing with Section 825) of Chapter 1 of Part 2 of Division 3.6 of Title 1 of the Government Code, a public entity is liable for death or injury to person or property to the same extent as a private person under the provisions of Article 2 (commencing with Section 17150) of this chapter.

Liability of Public Employee

V.C. 17004. A public employee is not liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle while responding to an emergency call or when in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm or other emergency call.

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GOVERNMENT CODE PROVISIONS RE LIABILITY

DIVISION 3.6. CLAIMS AND ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

PART 1. DEFINITIONS

Construction of Definitions

810. Unless the provision or context otherwise requires, the definitions contained in this part govern the construction of this division.

Definition of "Employee"

810.2. "Employee" includes an officer, employee, or servant, whether or not compensated, but does not include an independent contractor.

"Employment"

810.4. "Employment" includes office or employment.

"Enactment"

810.6. "Enactment" means a constitutional provision, statute, charter provision, ordinance or regulation.

"Injury"

810.8. "Injury" means death, injury to a person, damage to or loss of property, or any other injury that a person may suffer to his person, reputation, character, feelings or estate, of such nature that it would be actionable if inflicted by a private person.

"Law"

811. "Law" includes not only enactments but also the decisional law applicable within this State as determined and declared from time to time by the courts of this State and of the United States.

"Public Entity"

811.2. "Public entity" includes the State, the Regents of the University of California, a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State.

"Public Employee"

811.4. "Public employee" means an employee of a public entity.

"Regulation"

811.6. "Regulation" means a rule, regulation, order or standard, having the force of law, adopted by an employee or agency of the United States or of a public entity pursuant to authority vested by constitution, statute, charter or ordinance in such employee or agency to implement, interpret, or make specific the law enforced or administered by the employee or agency.

"Statute"

811.8. "Statute" means an act adopted by the Legislature of this State or by the Congress of the United States, or a statewide initiative act.

PART 2. LIABILITY OF PUBLIC ENTITIES AND PUBLIC EMPLOYEES

CHAPTER 1. GENERAL PROVISIONS RELATING TO LIABILITY

Article 1. Scope of Part

Effect

814. Nothing in this part affects liability based on contract or the right to obtain relief other than money or damages against a public entity or public employee.

Workmen's Compensation, No Implied Repeal

814.2. Nothing in this part shall be construed to impliedly repeal any provision of Division 4 (commencing with Section 3201) or Division 4.5 (commencing with Section 6100) of the Labor Code.

Article 2. Liability of Public Entities

Liability Based Only on Statute; Immunities; Defenses

815. Except as otherwise provided by statute:

(a) A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.

(b) The liability of a public entity established by this part (commencing with Section 814) is subject to any immunity of the public entity provided by statute, including this part, and is subject to any defenses that would be available to the public entity if it were a private person.

Liability for Employee's Acts

815.2. (a) A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative.

(b) Except as otherwise provided by statute, a public entity is not liable for an injury resulting from an act or omission of an employee of the public entity where the employee is immune from liability.

Liability for Acts of Independent Contractors

815.4. A public entity is liable for injury proximately caused by a tortious act or omission of an independent contractor of the public entity to the same extent that the public entity would be subject to such liability if it were a private person. Nothing in this section subjects a public entity to liability for the act or omission of an independent contractor if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity.

Liability for Breach of Mandatory Duty

815.6. Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.

Immunity From Punitive Damages

818. Notwithstanding any other provision of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

Law Adoption and Enforcement of Law

818.2. A public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law.

Permits or Licenses

818.4. A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Inspections

818.6. A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than its property (as defined in subdivision (c) of Section 830), for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

Misrepresentation

818.8. A public entity is not liable for an injury caused by misrepresentation by an employee of the public entity, whether or not such misrepresentation be negligent or intentional.

Article 3. Liability of Public Employees

Individual Liability of Employee, Defenses

820. (a) Except as otherwise provided by statute (including Section 820.2), a public employee is liable for injury caused by his act or omission to the same extent as a private person.

(b) The liability of a public employee established by this part (commencing with Section 814) is subject to any defenses that would be available to the public employee if he were a private person.

Discretionary Immunity

820.2. Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

Law Enforcement

820.4. A public employee is not liable for his act or omission, exercising due care, in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

Unconstitutional Enactments

820.6. If a public employee acts in good faith, without malice, and under the apparent authority of an enactment that is unconstitutional, invalid or inapplicable, he is not liable for an injury caused thereby except to the extent that he would have been liable had the enactment been constitutional, valid and applicable.

Liability for Acts of Third Parties

820.8. Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person. Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission.

Law Adoption and Enforcement of Enactment

821. A public employee is not liable for an injury caused by his adoption of or failure to adopt an enactment or by his failure to enforce an enactment.

Permits or Licenses

821.2. A public employee is not liable for an injury caused by his issuance, denial, suspension or revocation of, or by his failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where he is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked.

Inspections

821.4. A public employee is not liable for injury caused by his failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property, other than the property (as defined in subdivision (c) of Section 830) of the public entity employing the public employee, for the purpose of determining whether the property complies with or violates any enactment or contains or constitutes a hazard to health or safety.

Malicious Prosecution

821.6. A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

Entry Onto Private Property

821.8. A public employee is not liable for an injury arising out of his entry upon any property where such entry is expressly or impliedly authorized by law. Nothing in this section exonerates a public employee from liability for an injury proximately caused by his own negligent or wrongful act or omission.

Stolen Money

822. A public employee is not liable for money stolen from his official custody. Nothing in this section exonerates a public employee from liability if the loss was sustained as a result of his own negligent or wrongful act or omission.

Misrepresentation

822.2. A public employee acting in the scope of his employment is not liable for an injury caused by his misrepresentation, whether or not such misrepresentation be negligent or intentional, unless he is guilty of actual fraud, corruption or actual malice.

Article 4. Indemnification of Public Employees

Indemnity of Public Employee Where Entity Conducts Defense

825. If an employee or former employee of a public entity requests the public entity to defend him against any claim or action against him for an injury arising out of an act or omission occurring within the scope of his employment as an employee of the public entity and such request is made in writing not less than 10 days before the day of trial, and the employee or former employee reasonably cooperates in good faith in the defense of the claim or action, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.

If the public entity conducts the defense of an employee or former employee against any claim or action with his reasonable good faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed; but, where the public entity conducted such defense pursuant to an agreement with the employee or former employee reserving the rights of the public entity not to pay the judgment, compromise or settlement until it is established that the injury arose out of an act or omission occurring within the scope of his employment as an employee of the public entity, the public entity is required to pay the judgment, compromise or settlement only if it is established that the injury arose out of an act or omission occurring in the scope of his employment as an employee of the public entity.

Nothing in this section authorizes a public entity to pay such part of a claim or judgment as is for punitive or exemplary damages.

Judgment Paid by Public Employee; Reimbursement by Public Entity

825.2. (a) Subject to subdivision (b), if an employee or former employee of a public entity pays any claim or judgment against him, or any portion thereof, that the public entity is required to pay under Section 825, he is entitled to recover the amount of such payment from the public entity.

(b) If the public entity did not conduct his defense against the action or claim, or if the public entity conducted such defense pursuant to an agreement with him reserving the rights of the public entity against him, an employee or former employee of a public entity may recover from the public entity under subdivision (a) only if he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice or that he willfully failed

or refused to conduct the defense of the claim or action in good faith or to reasonably cooperate in good faith in the defense conducted by the public entity.

Subrogation

825.4. Except as provided in Section 825.6, if a public entity pays any claim or judgment against itself or against an employee or former employee of the public entity, or any portion thereof, for an injury arising out of an act or omission of the employee or former employee of the public entity, he is not liable to indemnify the public entity.

Indemnification of Public Entity by Employee Guilty of Fraud, Corruption, or Malice

825.6. (a) If a public entity pays any claim or judgment, or any portion thereof, either against itself or against an employee or former employee of the public entity, for an injury arising out of an act or omission of the employee or former employee of the public entity, the public entity may recover from the employee or former employee the amount of such payment if he acted or failed to act because of actual fraud, corruption or actual malice or if he willfully failed or refused to conduct the defense of the claim or action in good faith. Except as provided in subdivision (b) or (c), a public entity may not recover any payments made upon a judgment or claim against an employee or former employee if the public entity conducted his defense against the action or claim.

(b) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his act or omission, and if the public entity conducted his defense against the claim or action pursuant to an agreement with him reserving the rights of the public entity against him, the public entity may recover the amount of such payment from him unless he establishes that the act or omission upon which the claim or judgment is based occurred within the scope of his employment as an employee of the public entity and the public entity fails to establish that he acted or failed to act because of actual fraud, corruption or actual malice or that he willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity.

(c) If a public entity pays any claim or judgment, or any portion thereof, against an employee or former employee of the public entity for an injury arising out of his act or omission, and if the public entity conducted the defense against the claim or action in the absence of an agreement with him reserving the rights of the public entity against him, the public entity may recover the amount of such payment from him if he willfully failed or refused to reasonably cooperate in good faith in the defense conducted by the public entity.

CHAPTER 2. DANGEROUS CONDITIONS OF PUBLIC PROPERTY

Article 1. General

Definitions

830. As used in this chapter:

(a) "Dangerous condition" means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.

(b) "Protect against" includes repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition.

(c) "Property of a public entity" and "public property" mean real or personal property owned or controlled by the public entity, but do not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity.

Trivial Defect Rule

830.2. A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used.

Regulatory Traffic Controls and Signals

830.4. A condition is not a dangerous condition within the meaning of this chapter merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.

Evidence: Happening of Accident; Subsequent Precautions

830.5. (a) Except where the doctrine of res ipsa loquitur is applicable, the happening of the accident which results in the injury is not in and of itself evidence that public property was in a dangerous condition.

(b) The fact that action was taken after an injury occurred to protect against a condition of public property is not evidence that the public property was in a dangerous condition at the time of the injury.

Plan or Design of Public Improvements

830.6. Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.

Traffic or Warning Signals

830.8. Neither a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (other than one described in Section 830.4) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care.

Preemption of Traffic Signals

830.9. Neither a public entity nor a public employee is liable for an injury caused by the operation or nonoperation of official traffic control signals when controlled by an emergency vehicle in accordance with the provisions of subdivision (a) of Section 25258 of the Vehicle Code.

Weather Conditions

831. Neither a public entity nor a public employee is liable for an injury caused by the effect on the use of streets and highways of weather conditions as such. Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such effect if it would not be reasonably apparent to, and would not be anticipated by, a person exercising due care. For the purpose of this section, the effect on the use of streets and highways of weather conditions includes the effect of fog, wind, rain, flood, ice or snow but does not include physical damage to or deterioration of streets and highways resulting from weather conditions.

Natural Conditions

831.2. Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

Unpaved Roads, Trails

831.4. A public entity, public employee, or a grantor of a public easement to a public entity for any of the following purposes, is not liable for an injury caused by a condition of:

(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas and which is not a (1) city street or highway or (2) county, state or federal highway or (3) public street or highway of a joint highway district, boulevard district, bridge and highway district or similar district formed for the improvement or building of public streets or highways.

(b) Any trail used for the above purposes.

Tidelands, School Lands

831.6. Neither the State nor an employee of the State is liable under this chapter for any injury caused by a condition of the unimproved and unoccupied portions of:

(a) The ungranted tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits, owned by the State.

(b) The unsold portions of the 16th and 36th sections of school lands, the unsold portions of the 500,000 acres granted to the State for school purposes, and the unsold portions of the listed lands selected of the United States in lieu of the 16th and 36th sections and losses to the school grant.

Reservoirs

831.8. (a) Subject to subdivisions (c) and (d), neither a public entity nor a public employee is liable under this chapter for an injury caused by the condition of a reservoir if at the time of the injury the person injured was using the property for any purpose other than that for which the public entity intended or permitted the property to be used.

(b) Subject to subdivisions (c) and (d), neither an irrigation district nor an employee thereof nor the State nor a state employee is liable under this chapter for an injury caused by the condition of canals, conduits or drains used for the distribution of water if at the time of the injury the person injured was using the

16—75384

property for any purpose other than that for which the district or State intended it to be used.

(c) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if:

(1) The injured person was not guilty of a criminal offense under Article 1 (commencing with Section 552) of Chapter 12 of Title 13 of Part 1 of the Penal Code in entering on or using the property;

(2) The condition created a substantial and unreasonable risk of death or serious bodily harm when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used;

(3) The dangerous character of the condition was not reasonably apparent to, and would not have been anticipated by, a mature, reasonable person using the property with due care; and

(4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

(d) Nothing in this section exonerates a public entity or a public employee from liability for injury proximately caused by a dangerous condition of property if:

(1) The person injured was less than 12 years of age;

(2) The dangerous condition created a substantial and unreasonable risk of death or serious bodily harm to children under 12 years of age using the property or adjacent property with due care in a manner in which it was reasonably foreseeable that it would be used;

(3) The person injured, because of his immaturity, did not discover the condition or did not appreciate its dangerous character; and

(4) The public entity or the public employee had actual knowledge of the condition and knew or should have known of its dangerous character a sufficient time prior to the injury to have taken measures to protect against the condition.

Article 2. Liability of Public Entities

Dangerous Conditions: Liability of Entity

835. Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or

(b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Public Entities; Notice of Dangerous Conditions

835.2. (a) A public entity had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 835 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.

(b) A public entity had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 835 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. On the issue of due care, admissible evidence includes but is not limited to evidence as to:

(1) Whether the existence of the condition and its dangerous character would have been discovered by an inspection system that was reasonably adequate (considering the practicability and cost of inspection weighed against the likelihood and magnitude of the potential danger to which failure to inspect would give rise) to inform the public entity whether the property was safe for the use or uses for which the public entity used or intended others to use the public property and for uses that the public entity actually knew others were making of the public property or adjacent property.

(2) Whether the public entity maintained and operated such an inspection system with due care and did not discover the condition.

Dangerous Conditions; Public Entity Defenses

835.4. (a) A public entity is not liable under subdivision (a) of Section 835 for injury caused by a condition of its property if the public entity establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(b) A public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable. The reasonableness of the action or inaction of the public entity shall be determined by taking into consideration the time and opportunity it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

Article 3. Liability of Public Employees

Dangerous Condition: Liability of Employee

840. Except as provided in this article, a public employee is not liable for injury caused by a condition of public property where such condition exists because of any act or omission of such employee within the scope of his employment. The liability established by this article is subject to any immunity of the public employee provided by statute and is subject to any defenses that would be available to the public employee if he were a private person.

Elements of Liability of Employee for Dangerous Condition

840.2. An employee of a public entity is liable for injury caused by a dangerous condition of public property if the plaintiff establishes that the property of the public entity was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

(a) The dangerous condition was directly attributable wholly or in substantial part to a negligent or wrongful act of the employee and the employee had the authority and the funds and other means immediately available to take alternative action which would not have created the dangerous condition; or

(b) The employee had the authority and it was his responsibility to take adequate measures to protect against the dangerous condition at the expense of the public entity and the funds and other means for doing so were immediately available to him, and he had actual or constructive notice of the dangerous

condition under Section 840.4 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Public Employees; Notice of Dangerous Conditions

840.4. (a) A public employee had actual notice of a dangerous condition within the meaning of subdivision (b) of Section 840.2 if he had actual personal knowledge of the existence of the condition and knew or should have known of its dangerous character.

(b) A public employee had constructive notice of a dangerous condition within the meaning of subdivision (b) of Section 840.2 only if the plaintiff establishes (1) that the public employee had the authority and it was his responsibility as a public employee to inspect the property of the public entity or to see that inspections were made to determine whether dangerous conditions existed in the public property, (2) that the funds and other means for making such inspections or for seeing that such inspections were made were immediately available to the public employee, and (3) that the dangerous condition had existed for such a period of time and was of such an obvious nature that the public employee, in the exercise of his authority and responsibility with due care, should have discovered the condition and its dangerous character.

Reasonableness Defense

840.6. (a) A public employee is not liable under subdivision (a) of Section 840.2 for injury caused by a dangerous condition of public property if he establishes that the act or omission that created the condition was reasonable. The reasonableness of the act or omission that created the condition shall be determined by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury.

(b) A public employee is not liable under subdivision (b) of Section 840.2 for injury caused by a dangerous condition of public property if he establishes that the action taken to protect against the risk of injury created by the condition or the failure to take such action was reasonable. The reasonableness of the inaction or action shall be determined by taking into consideration the time and opportunity the public employee had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury against the practicability and cost of protecting against the risk of such injury.

CHAPTER 21. TORT LIABILITY UNDER AGREEMENTS BETWEEN PUBLIC ENTITIES

"Agreement"

895. As used in this chapter "agreement" means a joint powers agreement entered into pursuant to Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, an agreement to transfer the functions of a public entity or an employee thereof to another public entity pursuant to Part 2 (commencing with Section 51300) of Division 1 of Title 5 of the Government Code, and any other agreement under which a public entity undertakes to perform any function, service or act with or for any other public entity or employee thereof with its consent, whether such agreement is expressed by resolution, contract, ordinance or in any other manner provided by law; but "agreement" does not include an agreement between public entities which is designed to implement the disbursement or subvention of public funds from one

of the public entities to the other, whether or not it provides standards or controls governing the expenditure of such funds.

Joint and Several Liability

895.2. Whenever any public entities enter into an agreement, they are jointly and severally liable upon any liability which is imposed by any law other than this chapter upon any one of the entities or upon any entity created by the agreement for injury caused by a negligent or wrongful act or omission occurring in the performance of such agreement.

Notwithstanding any other law, if a judgment is recovered against a public entity for injury caused in the performance of an agreement, the time within which a claim for such injury may be presented or an action commenced against any other public entity that is subject to the liability determined by the judgment under the provisions of this section begins to run when the judgment is rendered.

Clause for Contribution or Indemnification

895.4. As part of any agreement, the public entities may provide for contribution or indemnification by any or all of the public entities that are parties to the agreement upon any liability arising out of the performance of the agreement.

Contribution in Absence of Indemnity Clause

895.6. Unless the public entities that are parties to an agreement otherwise provide in the agreement, if a public entity is held liable upon any judgment for damages caused by a negligent or wrongful act or omission occurring in the performance of the agreement and pays in excess of its pro rata share in satisfaction of such judgment, such public entity is entitled to contribution from each of the other public entities that are parties to the agreement. The pro rata share of each public entity is determined by dividing the total amount of the judgment by the number of public entities that are parties to the agreement. The right of contribution is limited to the amount paid in satisfaction of the judgment in excess of the pro rata share of the public entity so paying. No public entity may be compelled to make contribution beyond its own pro rata share of the entire judgment.

Applicability to Agreements

895.8. Except for Section 895.6, this chapter applies to any agreement between public entities, whether entered into before or after the effective date of this chapter. Section 895.6 applies to any agreement between public entities entered into, or renewed, modified, or extended, after the effective date of this chapter.

GOVERNMENT CODE PROVISIONS RE CLAIMS

PART 3. CLAIMS AGAINST PUBLIC ENTITIES

CHAPTER 1. GENERAL

Article 1. Definitions

Construction of Definition

900. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this part.

"Board"

900.2. "Board" means:

(a) In the case of a local public entity, the governing body of the local public entity.

(b) In the case of the State, the State Board of Control.

"Local Public Entity"

900.4. "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State.

"State"

900.6. "State" means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

Date of Accrual of Action

901. For the purpose of computing the time limits prescribed by Sections 911.2, 911.4, 912, and 945.6, the date of the accrual of a cause of action to which a claim relates is the date upon which the cause of action would be deemed to have accrued within the meaning of the statute of limitations which would be applicable thereto if there were no requirement that a claim be presented to and be acted upon by the public entity before an action could be commenced thereon.

Article 2. General Provisions

Claims Against Local Entities: Exceptions

905. There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against local public entities except:

(a) Claims under the Revenue and Taxation Code or other statute prescribing procedures for the refund, rebate, exemption, cancellation, amendment, modification or adjustment of any tax, assessment, fee or charge or any portion thereof, or of any penalties, costs or charges related thereto.

(b) Claims in connection with which the filing of a notice of lien, statement of claim, or stop notice is required under any provision of law relating to mechanics', laborers' or materialmen's liens.

(c) Claims by public employees for fees, salaries, wages, mileage or other expenses and allowances.

(d) Claims for which the workmen's compensation authorized by Division 4 (commencing with Section 3201) of the Labor Code is the exclusive remedy.

(e) Applications or claims for any form of public assistance under the Welfare and Institutions Code or other provisions of law relating to public assistance programs, and claims for goods, services, provisions or other assistance rendered for or on behalf of any recipient of any form of public assistance.

(f) Applications or claims for money or benefits under any public retirement or pension system.

(g) Claims for principal or interest upon any bonds, notes, warrants, or other evidences of indebtedness.

(h) Claims which relate to a special assessment constituting a specific lien against the property assessed and which are payable from the proceeds of such an assessment, by offset of a claim for damages against it or by delivery of any warrant or bonds representing it.

(i) Claims by the State or by a state department or agency or by another local public entity.

(j) Claims arising under any provision of the Unemployment Insurance Code, including but not limited to claims for money or benefits, or for refunds or credits of employer or worker contributions, penalties, or interest, or for refunds to workers of deductions from wages in excess of the amount prescribed.

(k) Claims for the recovery of penalties or forfeitures made pursuant to Article 1 (commencing with Section 1720) of Chapter 1 of Part 7 of Division 2 of the Labor Code.

(*l*) Claims governed by the Pedestrian Mall Law of 1960, Part 1 (commencing with Section 11000) of Division 13 of the Streets and Highways Code.

Inverse Condemnation

905.1. No claim is required to be filed to maintain an action against a public entity for taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution.

However, the board shall, in accordance with the provisions of this part, process any claim which is filed against a public entity for the taking of, or damage to, private property pursuant to Section 19 of Article I of the California Constitution.

Claims Against State

905.2. There shall be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part all claims for money or damages against the state:

(a) For which no appropriation has been made or for which no fund is available but the settlement of which has been provided for by statute or constitutional provision.

(b) For which the appropriation made or fund designated is exhausted.

(c) For money or damages (1) on express contract, or (2) for an injury for which the state is liable.

(d) For which settlement is not otherwise provided for by statute or constitutional provision.

Not Exclusive Claims Procedure

905.4. Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of this part shall not be construed to be an exclusive means for presenting claims to the Legislature nor as preventing the Legislature from making such appropriations as it deems proper for the payment of claims against the State which have not been submitted to the board or recommended for payment by it pursuant to Chapters 1 and 2 of this part.

Regents of University of California

905.6. This part does not apply to claims against the Regents of the University of California.

Substantive Liability

905.8. Nothing in this part imposes liability upon a public entity unless such liability otherwise exists.

CHAPTER 2. PRESENTATION AND CONSIDERATION OF CLAIMS

Article 1. General

Contents of Claim

910. A claim shall be presented by the claimant or by a person acting on his behalf and shall show:

(a) The name and post office address of the claimant;

(b) The post office address to which the person presenting the claim desires notices to be sent;

(c) The date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted;

(d) A general description of the indebtedness, obligation, injury, damage or loss incurred so far as it may be known at the time of presentation of the claim;

(e) The name or names of the public employee or employees causing the injury, damage, or loss, if known; and

(f) The amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss, insofar as it may be known at the time of the presentation of the claim, together with the basis of computation of the amount claimed.

Claim Signed

910.2. The claim shall be signed by the claimant or by some person on his behalf. Claims against local public entities for supplies, materials, equipment or services need not be signed by the claimant or on his behalf if presented on a billhead or invoice regularly used in the conduct of the business of the claimant.

Alternate Form of Claim

910.4. The board may provide forms specifying the information to be contained in claims against the public entity. If the board provides forms pursuant to this section, the person presenting a claim need not use such form if he presents his claim in conformity with Sections 910 and 910.2. A claim presented on a form provided pursuant to this section shall be deemed to be in conformity with Sections 910 and 910.2 if the claim complies substantially with the requirements of the form or with the requirements of Sections 910 and 910.2.

Amended Claims

910.6. (a) A claim may be amended at any time before the expiration of the period designated in Section 911.2 or before final action thereon is taken by the board, whichever is later, if the claim as amended relates to the same transaction or occurrence which gave rise to the original claim. The amendment shall be considered a part of the original claim for all purposes.

(b) A failure or refusal to amend a claim, whether or not notice of insufficiency is given under Section 910.8, shall not consititute a defense to any action brought upon the cause of action for which the claim was presented if the court finds that the claim as presented complied substantially with Sections 910 and 910.2 or a form provided under Section 910.4.

Notice of Insufficiency of Claim; Service of Notice; Action on Claim

910.8. If in the opinion of the board or the person designated by it a claim as presented fails to comply substantially with the requirements of Sections 910 and 910.2, or with the requirements of a form provided under Section 910.4 if a claim is presented pursuant thereto, the board or such person may, at any time within 20 days after the claim is presented, give written notice of its insufficiency, stating with particularity the defects or omissions therein. Such notice shall be given in the manner prescribed by Section 915.4. The board may not take action on the claim for a period of 15 days after such notice is given.

Waiver of Defect in Claim

911. Any defense as to the sufficiency of the claim based upon a defect or omission in the claim as presented is waived by failure to give notice of insufficiency with respect to such defect or omission as provided in Section 910.8, except that no notice need be given and no waiver shall result when the claim as presented fails to state either an address to which the person presenting the claim desires notices to be sent or an address of the claimant.

Time for Presenting Claims

911.2. A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than the 100th day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action.

Application to File Late Claim

911.4. (a) When a claim that is required by Section 911.2 to be presented not later than the 100th day after the accrual of the cause of action is not presented within such time, a written application may be made to the public entity for leave to present such claim.

(b) The application shall be presented to the public entity as provided in Article 2 (commencing with Section 915) of this chapter within a reasonable time not to exceed one year after the accrual of the cause of action and shall state the reason for the delay in presenting the claim. The proposed claim shall be attached to the application. In computing the one-year period under this subdivision, time during which the person who sustained the alleged injury, damage, or loss is a minor shall be counted, but the time during which he is mentally incapacitated and does not have a guardian or a conservator of his person shall not be counted.

Automatic Denial and Granting of Application

911.6. (a) The board shall grant or deny the application within 45 days after it is presented to the board. If the board does not act upon the application within 45 days after the application is presented, the application shall be deemed to have been denied on the 45th day.

(b) The board shall grant the application where:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect and the public entity was not prejudiced by the failure to present the claim within the time specified in Section 911.2; or

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim; or

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time; or

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

Written Notice

911.8. (a) Written notice of the board's action upon the application shall be given in the manner prescribed by Section 915.4.

(b) If the application is denied, the notice shall include a warning in substantially the following form:

"WARNING

"If you wish to file a court action on this matter, you must first petition the appropriate court for an order relieving you from the provisions of Government Code Section 945.4 (claims presentation requirement). See Government Code Section 946.6. Such petition must be filed with the court within six (6) months from the date your application for leave to present a late claim was denied.

"You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

Time Limitations for Approved Application for Leave to Present Claim

912.2. If an application for leave to present a claim is granted by the board pursuant to Section 911.6, the claim shall be deemed to have been presented to the board upon the day that leave to present the claim is granted.

Time

912.4. (a) The board shall act on a claim in the manner provided in Section 912.6 or 912.8 within 45 days after the claim has been presented. If a claim is amended, the board shall act on the amended claim within 45 days after the amended claim is presented.

(b) The claimant and the board may extend the period within which the board is required to act on the claim by written agreement made:

(1) Before the expiration of such period; or

(2) After the expiration of such period if an action based on the claim has not been commenced and is not yet barred by the period of limitations provided in Section 945.6.

(c) If the board fails or refuses to act on a claim within the time prescribed by this section, the claim shall be deemed to have been rejected by the board on the last day of the period within which the board was required to act upon the claim. If the period within which the board is required to act is extended by agreement pursuant to this section, whether made before or after the expiration of such period, the last day of the period within which the board is required to act shall be the last day of the period specified in such agreement.

Action on Claim Against Local Entity

912.6. (a) In the case of a claim against a local public entity, the board may act on a claim in one of the following ways:

(1) If the board finds the claim is not a proper charge against the public entity, it shall reject the claim.

(2) If the board finds the claim is a proper charge against the public entity and is for an amount justly due, it shall allow the claim.

(3) If the board finds the claim is a proper charge against the public entity but is for an amount greater than is justly due, it shall either reject the claim or allow it in the amount justly due and reject it as to the balance.

(4) If legal liability of the public entity or the amount justly due is disputed, the board may reject the claim or may compromise the claim.

(b) In the case of a claim against a local public entity, if the board allows the claim in whole or in part or compromises the claim, it may require the claimant, if he accepts the amount allowed or offered to settle the claim, to accept it in settlement of the entire claim.

Action on Claim by Board

912.8. In the case of claims against the State, the board shall act on claims in accordance with such procedure as the board, by rule, may prescribe. It may hear evidence for and against them and, with the approval of the Governor, report to the Legislature such facts and recommendations concerning them as it deems proper. In making recommendations the board may state and use any official or personal knowledge which any member may have touching any claim. The board may authorize any employee of the State to perform such functions of the board under this part as are prescribed by the board; but, subject to Section 935.6, the board may not authorize an employee to allow, compromise or settle a claim.

Written Notice

913. (a) Written notice of the action taken under Section 912.6 or 912.8 or the inaction which is deemed rejection under Section 912.4 shall be given in the manner prescribed by Section 915.4. Such notice may be in substantially the following form:

"Notice is hereby given that the claim which you presented to the (insert title of board or officer) on (indicate date) was (indicate whether rejected, allowed, allowed in the amount of $_____ and rejected as to the balance, rejected by operation of law, or other appropriate language, whichever is applicable) on (indicate date of action or rejection by operation of law)."

(b) If the claim is rejected in whole or in part, the notice required by subdivision (a) shall include a warning in substantially the following form:

"WARNING

"Subject to certain exceptions, you have only six (6) months from the date this notice was personally delivered or deposited in the mail to file a court action on this claim. See Government Code Section 945.6.

"You may seek the advice of an attorney of your choice in connection with this matter. If you desire to consult an attorney, you should do so immediately."

Reconsideration

913.2. The board may, in its discretion, within the time prescribed by Section 945.6 for commencing an action on the claim, re-examine a previously rejected claim in order to consider a settlement of the claim.

Article 2. Manner of Presentation and of Giving Notice

Presentation of Claim

915. (a) A claim, any amendment thereto, or an application to the public entity for leave to present a late claim shall be presented to a local public entity by:

(1) Delivering it to the clerk, secretary or auditor thereof; or

(2) Mailing it to such clerk, secretary or auditor or to the governing body at its principal office.

(b) A claim, any amendment thereto, or an application for leave to file a late claim shall be presented to the state by:

(1) Delivering it to an office of the State Board of Control; or

(2) Mailing it to the State Board of Control at its principal office.

(c) A claim, amendment or application shall be deemed to have been presented in compliance with this section even though it is not delivered or mailed as provided in this section if it is actually received by the clerk, secretary, auditor or board of the local public entity, or is actually received at an office of the State Board of Control, within the time prescribed for presentation thereof.

(d) A claim, amendment or application shall be deemed to have been presented in compliance with this section to a public agency as defined in Section 53050 if it is delivered or mailed within the time prescribed for presentation thereof in conformity with the information contained in the statement in the Roster of Public Agencies pertaining to that public agency which is on file at the time the claim, amendment or application is delivered or mailed. As used in this subdivision, "statement in the Roster of Public Agencies" means the statement or amended statement in the Roster of Public Agencies in the office of the Secretary of State or in the office of the county clerk of any county in which such statement or amended statement is on file.

Deposit in Mail

915.2. If a claim, amendment to a claim or application to a public entity for leave to present a late claim is presented or sent by mail under this chapter, or if any notice under this chapter is given by mail, the claim, amendment, application or notice shall be mailed in the manner prescribed in this section. The claim, amendment, application or notice must be deposited in the United States post office, or a mailbox, sub-post office, substation, or mail chute or other like facility regularly maintained by the government of the United States, in a sealed envelope, properly addressed, with postage paid. The claim, amendment, application or notice shall be deemed to have been presented and received at the time of the deposit. Proof of mailing may be made in the manner prescribed by Section 1013a of the Code of Civil Procedure.

Contents of Notice

915.4. (a) The notices provided for in Sections 910.8, 911.8, and 913 shall be given by either of the following methods:

(1) Personally delivering the notice to the person presenting the claim or making the application.

(2) Mailing the notice to the address, if any, stated in the claim or application as the address to which the person presenting the claim or making the application desires notices to be sent or, if no such address is stated in the claim or application, by mailing the notice to the address, if any, of the claimant as stated in the claim or application.

(b) No notice need be given where the claim or application fails to state either an address to which the person presenting the claim or making the application desires notices to be sent or an address of the claimant.

Interest on Liquidated Claims Against Another Public Entity

926.10. Any public entity as defined by Section 811.2 having a liquidated claim against any other public entity based on contract or statute of the State of California, or any person having such a claim against a public agency, shall be entitled to interest commencing the 61st day after such public entity or person files a liquidated claim known or agreed to be valid when filed pursuant to such statute or contract, and such claim is due and payable. Interest shall be 6 percent per annum.

CHAPTER 5. CLAIMS PROCEDURES ESTABLISHED BY AGREEMENT

Claims Procedure Established by Agreement

930. The State Board of Control may, by rule, authorize any state agency to include in any written agreement to which the agency is a party, provisions governing (a) the presentation, by or on behalf of any party thereto, of any or all claims which are required to be presented to the board arising out of or related to the agreement and (b) the consideration and payment of such claims. As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the state, claims against which are paid by warrants drawn by the Controller.

Agreements With Local Entity

930.2. The governing body of a local public entity may include in any written agreement to which the entity, its governing body, or any board or employee thereof in an official capacity is a party, provisions governing the presentation, by or on behalf of any party thereto, of any or all claims arising out of or related to the agreement and the consideration and payment of such claims. The written agreement may incorporate by reference claim provisions set forth in a specifically identified ordinance or resolution theretofore adopted by the governing body.

Application to Present Late Claim

930.4. A claims procedure established by agreement made pursuant to Section 930 or Section 930.2 exclusively governs the claims to which it relates, except that if the procedure so prescribed requires a claim to be presented within a period of less than one year after the accrual of the cause of action and such claim is not presented within the required time, an application may be made to the public entity for leave to present such claim. Subdivision (b) of Section 911.4, Sections 911.6 to 912.2, inclusive, and Section 946.6 are applicable to all such claims, and the time specified in the agreement shall be deemed the "time specified in Section 911.2" within the meaning of Sections 911.6 and 946.6.

Claim as a Prerequisite to Suit

930.6. A claims procedure established by agreement made pursuant to Section 930 or Section 930.2 may include a requirement that a claim be presented and acted upon as a prerequisite to suit thereon. If such requirement is included, any action brought against the public entity on the claim shall be subject to the provisions of Section 945.6 and Section 946.

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Settlement of Claims

935.6. The State Board of Control, by rule, may authorize any state agency to adjust and pay claims where the settlement does not exceed one thousand dollars ($1,000) or such lesser amount as the board may determine and, except for claims arising from the activities of the Department of Public Works, the Director of Finance certifies that a sufficient appropriation for such payment exists. Payments shall be made only upon approval of the settlement by the board. As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller.

GOVERNMENT CODE PROVISIONS RE ACTIONS

PART 4. ACTIONS AGAINST PUBLIC ENTITIES AND PUBLIC EMPLOYEES

CHAPTER 1. GENERAL

Article 1. Definitions

Definitions

940. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this part.

"Board"

940.2. "Board" means:

(a) In the case of a local public entity, the governing body of the local public entity.

(b) In the case of the State, the State Board of Control.

"Local Public Entity"

940.4. "Local public entity" includes a county, city, district, public authority, public agency, and any other political subdivision or public corporation in the State, but does not include the State.

"State"

940.6. "State" means the State and any office, officer, department, division, bureau, board, commission or agency of the State claims against which are paid by warrants drawn by the Controller.

Article 2. Construction

Writ of Mandate

942. Nothing in this division shall be construed to deprive a claimant of the right to resort to writ of mandate or other proceeding against the public entity or the board or any employee of the public entity to compel it or him to pay the claim when and to the extent that it has been allowed.

Regents Exempted

943. This part does not apply to claims or actions against the Regents of the University of California nor to claims or actions against an employee or former employee of the Regents of the University of California arising out of such employment.

No Imposition of Liability

944. Nothing in this part imposes liability upon a public entity unless such liability otherwise exists.

CHAPTER 2. ACTIONS AGAINST PUBLIC ENTITIES

Sue and Be Sued

945. A public entity may sue and be sued.

Rules of Civil Practice

945.2. Except as otherwise provided by law, the rules of practice in civil actions apply to actions brought against public entities.

Premature Actions

945.4. Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.

Statute of Limitations: Where Claim Is Necessary; Prisoner Exemption

945.6. (a) Except as provided in Sections 946.4 and 946.6 and subject to subdivision (b), any suit brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced:

(1) If written notice is given in accordance with Section 913, not later than six months after the date such notice is personally delivered or deposited in the mail.

(2) If written notice is not given in accordance with Section 913, within two years from the accrual of the cause of action. If the period within which the public entity is required to act is extended pursuant to subdivision (b) of Section 912.4, the period of such extension is not part of the time limited for the commencement of the action under this paragraph.

(b) When a person is unable to commence a suit on a cause of action described in subdivision (a) within the time prescribed in that subdivision because he has been sentenced to imprisonment in a state prison, the time limit for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public entity establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (a).

(c) A person sentenced to imprisonment in a state prison may not commence a suit on a cause of action described in subdivision (a) unless he presented a claim in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division.

Statute of Limitations: Where No Claim Necessary

945.8. Except where a different statute of limitations is specifically applicable to the public entity, and except as provided in Sections 930.6 and 935, any action against a public entity upon a cause of action for which a claim is not required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division must be commenced within the time prescribed by the statute of limitations that would be applicable if the action were brought against a defendant other than a public entity.

Allowed Claim: Suit Barred

946. Where a claim that is required to be presented to a public entity in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division is so presented and action thereon is taken by the board:

(a) If the claim is allowed in full and the claimant accepts the amount allowed, no suit may be maintained on any part of the cause of action to which the claim relates.

(b) If the claim is allowed in part and the claimant accepts the amount allowed, no suit may be maintained on that part of the cause of action which is represented by the allowed portion of the claim.

(c) If the claim is allowed in part, no suit may be maintained on any portion of the cause of action where, pursuant to a requirement of the board to such effect, the claimaint has accepted the amount allowed in settlement of the entire claim.

Petition to Dispense With Filing Claim

946.6. (a) Where an application for leave to present a claim is denied or deemed to be denied pursuant to Section 911.6, a petition may be made to the court for an order relieving the petitioner from the provisions of Section 945.4. The proper court for filing the petition is a court which would be a competent court for the trial of an action on the cause of action to which the claim relates and which is located in a county or judicial district which would be a proper place for the trial of such action, and if the petition is filed in a court which is not a proper court for the determination of the matter, the court, on motion of any party, shall transfer the proceeding to a proper court.

(b) The petition must show (1) that application was made to the board under Section 911.4 and was denied or deemed denied, (2) the reason for failure to present the claim within the time limit specified in Section 911.2 and (3) the information required by Section 910. The petition shall be filed within six months after the application to the board is denied or deemed to be denied pursuant to Section 911.6.

(c) The court shall relieve the petitioner from the provisions of Section 945.4 if the court finds that the application to the board under Section 911.4 was made within a reasonable time not to exceed that specified in subdivision (b) of Section 911.4 and was denied or deemed denied pursuant to Section 911.6 and that:

(1) The failure to present the claim was through mistake, inadvertence, surprise or excusable neglect unless the public entity establishes that it would be prejudiced if the court relieves the petitioner from the provisions of Section 945.4; or

(2) The person who sustained the alleged injury, damage or loss was a minor during all of the time specified in Section 911.2 for the presentation of the claim; or

(3) The person who sustained the alleged injury, damage or loss was physically or mentally incapacitated during all of the time specified in Section 911.2 for the presentation of the claim and by reason of such disability failed to present a claim during such time; or

(4) The person who sustained the alleged injury, damage or loss died before the expiration of the time specified in Section 911.2 for the presentation of the claim.

(d) A copy of the petition and a written notice of the time and place of hearing thereof shall be served not less than 10 days before the hearing on (1) the clerk or secretary or board of the local public entity, if the respondent is a local public entity, or (2) the State Board of Control or its secretary, if the respondent is the state.

(e) The court shall make an independent determination upon the petition. The determination shall be made upon the basis of the petition, any affidavits in support of or in opposition to the petition, and any additional evidence received at the hearing on the petition.

(f) If the court makes an order relieving the petitioner from the provisions of Section 945.4, suit on the cause of action to which the claim relates must be filed in such court within 30 days thereafter.

Demand for Bond; Allowable Costs; Small Claims Exempt

947. (a) At any time after the filing of the complaint in any action against a public entity, the public entity may file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ($100) for each plaintiff or in the case of multiple plaintiffs in the amount of two hundred dollars ($200), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of a demand therefor, his action shall be dismissed.

(b) This section does not apply to an action commenced in a small claims court.

Settlement of Actions

948. The head of the state agency concerned, upon recommendation of the Attorney General or other attorney authorized to represent the state, may settle, adjust or compromise any pending action where, except for an action arising from the activities of the Department of Public Works, the Director of Finance certifies that a sufficient appropriation for the payment of claims exists. Where no funds or insufficient funds for such payment exist, the head of the state agency concerned, upon recommendation of the Attorney General or other attorney authorized to represent the state, may settle, adjust or compromise any pending action with the approval of the Department of Finance. As used in this section, "state agency" means any office, officer, department, division, bureau, board, commission or agency of the state claims against which are paid by warrants drawn by the Controller.

Local Entity Settlements

949. The governing body of a local public entity may compromise, or may delegate the authority to its attorney or an employee to compromise, any pending action.

CHAPTER 3. ACTIONS AGAINST PUBLIC EMPLOYEES

No Claim Against Employee

950. Except as otherwise provided in this chapter, a claim need not be presented as a prerequisite to the maintenance of an action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee.

When Action Against Employee Barred

950.2. Except as provided in Section 950.4, a cause of action against a public employee or former public employee for injury resulting from an act or omission in the scope of his employment as a public employee is barred if an action against the employing public entity for such injury is barred under Part 3 (commencing with Section 900) of this division or under Chapter 2 (commencing with Section 945) of Part 4 of this division. This section is applicable even though the public entity is immune from liability for the injury.

Exception: No Knowledge of Public Employment

950.4. A cause of action against a public employee or former public employee is not barred by Section 950.2 if the plaintiff pleads and proves that he did not know or have reason to know, within the period for the presentation of a claim to the employing public entity as a condition to maintaining an action for such injury against the employing public entity, as that period is prescribed by Section 911.2 or by such other claims procedure as may be applicable, that the injury was caused by an act or omission of the public entity or by an act or omission of an employee of the public entity in the scope of his employment as a public employee.

Time to File Action Against Employee

950.6. When a written claim for money or damages for injury has been presented to the employing public entity:

(a) A cause of action for such injury may not be maintained against the public employee or former public employee whose act or omission caused such injury until the claim has been rejected, or has been deemed to have been rejected, in whole or in part by the public entity.

(b) A suit against the public employee or former public employee for such injury must be commenced within the time prescribed by Section 945.6 for bringing an action against the public entity.

(c) When a person is unable to commence the suit within the time prescribed in subdivision (b) because he has been sentenced to imprisonment in a state prison, the time limited for the commencement of such suit is extended to six months after the date that the civil right to commence such action is restored to such person, except that the time shall not be extended if the public employee or former public employee establishes that the plaintiff failed to make a reasonable effort to commence the suit, or to obtain a restoration of his civil right to do so, before the expiration of the time prescribed in subdivision (b).

Other Provisions by Local Entities Involved

950.8. Any provision of a charter, ordinance or regulation heretofore or hereafter adopted by a local public entity which requires the presentation of a claim as a prerequisite to the maintenance of an action against a public employee to enforce his personal liability is invalid.

Demand for Bond; Allowable Costs; Small Claims Exempt

951. (a) At any time after the filing of the complaint in any action against a public employee or former public employee, if a public entity undertakes to provide for the defense of the action, the attorney for the public employee may file and serve a demand for a written undertaking on the part of each plaintiff as security for the allowable costs which may be awarded against such plaintiff. The undertaking shall be in the amount of one hundred dollars ($100), or such greater sum as the court shall fix upon good cause shown, with at least two sufficient sureties, to be approved by the court. Unless the plaintiff files such undertaking within 20 days after service of the demand therefor, his action shall be dismissed.

(b) This section does not apply to an action commenced in a small claims court.

CHAPTER 4. SPECIAL PROVISIONS RELATING TO ACTIONS AGAINST THE STATE

Venue: Inverse Condemnation; All Other Actions

955. The proper court for trial of actions against the State for the taking or damaging of private property for public use is a court of competent jurisdiction in the county in which the property is situate.

Except as provided in Section 955.2, upon written demand of the Attorney General made on or before answering, the place of trial in other actions shall be changed to Sacramento County.

Earthquake Predictions

955.1. (a) The science of earthquake prediction is developing rapidly and, although still largely in a research stage, such predictions are now being initiated and are certain to continue into the future. Administrative procedures exist within the Office of Emergency Services to advise the Governor on the validity of earthquake predictions. Numerous important actions can be taken by state and local governments and special districts to protect life and property in response to predictions and associated warnings. It is the intent of this legislation to insure that appropriate actions are taken in the public interest by government agencies without fear of consequent financial liabilities when acting in a responsible manner under such circumstances to assure public safety. This legislation is not intended to provide immunity for government officials and other government employees acting in a nondiscretionary capacity from liability for injuries arising out of ordinary negligence. It is also the intent of this legislation that actions taken by state and local agencies pursuant to the authorized dissemination of an earthquake prediction may be taken under conditions other than a declared state of emergency.

(b) The Governor may, at his discretion, warn the public as to the existence of an earthquake prediction determined to have scientific validity. The state and its agencies shall not be liable for any injury resulting from the decision to issue or not to issue a warning pursuant to this subdivision.

(c) In addition, the state, its agencies, and its political subdivisions may, on the basis of a warning issued pursuant to subdivision (b), take, or fail or refuse to take, any action with relation to the warning issued which is otherwise authorized by law. In taking, or failing or refusing to take such action, the state, its agencies, and its political subdivisions shall be subject to the same immunities as apply to such action, or failure or refusal to take such action, when done upon any other valid basis.

Venue: Tort Actions

955.2. Notwithstanding any other provision of law, where the State is named as a defendant in any action or proceeding for death or injury to person or personal property and the injury or the injury causing death occurred within this State, the proper court for the trial of the action is a court of competent jurisdiction in the county where the injury occurred or where the injury causing death occurred. The court may, on motion, change the place of the trial in the same manner and under the same circumstances as the place of trial may be changed where an action is between private parties.

Service of Summons: General

955.4. Except as provided in Sections 955.6 and 955.8:

(a) Service of summons in all actions on claims against the State shall be made on the Attorney General.

(b) The Attorney General shall defend all actions on claims against the State.

Court Cannot Require Payment of Tort Judgement; Garnishment; Execution; Attachment

955.5. Notwithstanding any other provision of law, including Section 942 of this code, neither the state, nor any of its officers or employees, can be required by any court in any proceeding to pay or offset a tort liability claim, settlement or judgment for which the state is liable unless the Legislature has authorized the payment or offset of a specific tort liability claim, settlement or judgment, or the Director of Finance has certified that a sufficient appropriation for such payment or to provide for the offset exists. No money or property belonging to, in the custody of or owing to the state or any state agency is subject to garnishment, execution, or attachment or any other proceeding for enforcing any such claim, settlement or judgment.

Same: Inverse Condemnation; Public Works

955.6. In actions for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution on claims arising out of work done by the Department of Public Works:

(a) Service of summons shall be made on the Attorney General or the Director of Public Works.

(b) The defense shall be conducted by the attorney for the Department of Public Works.

Same: Inverse Condemnation; Water Resources

955.8. In actions for the taking or damaging of private property for public use within the meaning of Section 14 of Article I of the Constitution on claims arising out of work done by the Department of Water Resources:

(a) Service of summons shall be made on the Attorney General or the Director of Water Resources.

(b) The defense shall be conducted by the legal counsel of the department, if authorized by the Attorney General pursuant to Section 127 of the Water Code; otherwise the defense shall be conducted by the Attorney General.

State as Defendant in Partition Suit

956. Whenever the State has acquired by gift, under the will of a decedent or through a decree of distribution in the estate of a decedent, or otherwise than by purchase or the exercise of the power of eminent domain, a remainder interest, whether contingent or vested, in real property, or an undivided fractional interest in real property, the holder or holders of the precedent estate or of other undivided fractional interests, as the case may be, may join the State as a party defendant in any action to partition said property, brought pursuant to the Code

of Civil Procedure or in any action in declaratory relief brought pursuant to the Code of Civil Procedure. In the complaint in any such action the nature of the interest of the State shall be set forth and the manner in which the same was acquired and process in any such action shall be served upon the Attorney General and the Director of Finance. In any such action the Attorney General shall represent the State and may on behalf of the State execute such stipulations, disclaimers or consents as may be appropriate.

GOVERNMENT CODE PROVISIONS RE PAYMENT OF CLAIMS

PART 5. PAYMENT OF CLAIMS AND JUDGMENTS

CHAPTER 1. PAYMENT OF CLAIMS AND JUDGMENTS AGAINST THE STATE

Payment of Claims

965. Upon the allowance by the State Board of Control of all or part of a claim for which, except for a claim arising from the activities of the Department of Public Works, the Director of Finance certifies that a sufficient appropriation exists, and the execution and presentation of such documents as the board may require which discharge the state of all liability under the claim, the board shall designate the fund from which the claim is to be paid and the state agency concerned shall pay the claim from such fund. Where no sufficient appropriation for such payment is available, the board shall report to the Legislature in accordance with Section 912.8.

Controller's Warrant

965.2. The Controller shall draw his warrant for the payment of any final judgment or settlement against the state whenever, except where the judgment or settlement arose out of the activities of the Department of Public Works, the Director of Finance certifies that a sufficient appropriation for such payment exists. Claims upon such judgments and settlements are exempt from Section 925.6.

Report

965.4. The Governor shall report to the Legislature, at each session, all judgments or settlements against the State not theretofore reported.

CHAPTER 3. CONSTRUCTION CLAIMS AND CONTRACT PAYMENTS

Payment of Interest

980. Whenever a request for payment from the state or a local entity pursuant to the terms of a contract for the construction of a public works project as defined in Section 1720 of the Labor Code is properly filed and the validity of such claim is not disputed or has been settled or agreed upon, payment of such claim by the disbursing officer of the state or local public entity shall include interest at the legal rate of 7 percent per annum commencing 90 days after the proper submission of such claim.

GOVERNMENT CODE PROVISIONS RE DEFENSE OF EMPLOYEES

PART 7. DEFENSE OF PUBLIC EMPLOYEES

Obligation to Defend

995. Except as otherwise provided in Sections 995.2 and 995.4, upon request of an employee or former employee, a public entity shall provide for the defense of any civil action or proceeding brought against him, in his official or individual capacity or both, on account of an act or omission in the scope of his employment as an employee of the public entity.

For the purposes of this part, a cross-action, counterclaim or cross-complaint against an employee or former employee shall be deemed to be a civil action or proceeding brought against him.

May Refuse to Defend

995.2. A public entity may refuse to provide for the defense of an action or proceeding brought against an employee or former employee if the public entity determines that:

(a) The act or omission was not within the scope of his employment; or

(b) He acted or failed to act because of actual fraud, corruption or actual malice; or

(c) The defense of the action or proceeding by the public entity would create a conflict of interest between the public entity and the employee or former employee.

May Defend

995.4. A public entity may, but is not required to, provide for the defense of:

(a) An action or proceeding brought by the public entity to remove, suspend or otherwise penalize its own employee or former employee, or an appeal to a court from an administrative proceeding by the public entity to remove, suspend or otherwise penalize its own employee or former employee.

(b) An action or proceeding brought by the public entity against its own employee or former employee as an individual and not in his official capacity, or an appeal therefrom.

Need Not Defend

995.6. A public entity is not required to provide for the defense of an administrative proceeding brought against an employee or former employee, but a public entity may provide for the defense of an administrative proceeding brought against an employee or former employee if:

(a) The administrative proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and

(b) The public entity determines that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity.

Criminal Actions

995.8. A public entity is not required to provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee, but a public entity may provide for the defense of a criminal action or proceeding (including a proceeding to remove an officer under Sections 3060 to 3073, inclusive, of the Government Code) brought against an employee or former employee if:

(a) The criminal action or proceeding is brought on account of an act or omission in the scope of his employment as an employee of the public entity; and

(b) The public entity determines that such defense would be in the best interests of the public entity and that the employee or former employee acted, or failed to act, in good faith, without actual malice and in the apparent interests of the public entity.

Defense Counsel

996. A public entity may provide for a defense pursuant to this part by its own attorney or by employing other counsel for this purpose or by purchasing insurance which requires that the insurer provide the defense. All of the expenses of providing a defense pursuant to this part are proper charges against a public entity. A public entity has no right to recover such expenses from the employee or former employee defended.

Failure to Defend

996.4. If after request a public entity fails or refuses to provide an employee or former employee with a defense against a civil action or proceeding brought against him and the employee retains his own counsel to defend the action or proceeding, he is entitled to recover from the public entity such reasonable attorney's fees, costs and expenses as are necessarily incurred by him in defending the action or proceeding if the action or proceeding arose out of an act or omission in the scope of his employment as an employee of the public entity, but he is not entitled to such reimbursement if the public entity establishes (a) that he acted or failed to act because of actual fraud, corruption or actual malice, or (b) that the action or proceeding is one described in Section 995.4.

Nothing in this section shall be construed to deprive an employee or former employee of the right to petition for a writ of mandate to compel the public entity or the governing body or an employee thereof to perform the duties imposed by this part.

Cumulative Rights

996.6. The rights of an employee or former employee under this part are in addition to and not in lieu of any rights he may have under any contract or under any other enactment providing for his defense.

Chapter 65. Miscellaneous Provisions

Sec. 09.65.070. Suits against incorporated units of local government.

(a) Except as provided in this section, an action may be maintained against a municipality in its corporate character and within the scope of its authority.

(b) A municipality may not require a person to post bond as a condition to bringing a cause of action against it.

(c) No action may be maintained against an employee or member of a fire department operated and maintained by a municipality or village if the claim is an action for tort or breach of a contractual duty and is based upon the act or omission of the employee or member of the fire department in the execution of a function for which the department is established.

(d) No action for damages may be brought against a municipality or any of its agents, officers or employees if the claim

(1) is based on a failure of the municipality, or its agents, officers, or employees, when the municipality is neither owner nor lessee of the property involved,

(A) to inspect property for a violation of any statute, regulation or ordinance, or a hazard to health or safety;

(B) to discover a violation of any statute, regulation, or ordinance, or a hazard to health or safety if an inspection of property is made; or

(C) to abate a violation of any statute, regulation or ordinance, or a hazard to health or safety discovered on property inspected;

(2) is based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty by a municipality or its agents, officers, or employees, whether or not the discretion involved is abused;

(3) is based upon the grant, issuance, refusal, suspension, delay or denial of a license, permit, appeal, approval, exception, variance, or other entitlement, or a rezoning;

(4) is based on the exercise or performance during the course of gratuitous extension of municipal services on an extraterritorial basis; or

(5) is based upon the exercise or performance of a duty or function upon the request of, or by the terms of an agreement or contract with, the state to meet emergency public safety requirements.

(e) In this section

(1) "municipality" means a home rule borough or city, a general law borough or city of any class, a unified municipality established under AS 29.68.240 - 29.68.440, or a municipality established by merger or consolidation under AS 29.68.030 - 29.68.110; the term includes a public corporation established by a municipality;

(2) "village" means an unincorporated community where at least 25 people reside as a social unit. (§ 5.13 ch 101 SLA 1962; am § 1 ch 23 SLA 1964; am § 1 ch 19 SLA 1975; am § 1 ch 215 SLA 1975; am §§ 1-3 ch 37 SLA 1977)

Effects of amendments.--The first 1975 amendment, effective March 25, 1975, added subsection (b).

The second 1975 amendment added subsection (c).

The 1977 amendment, effective May 18, 1977, in subsection (a), added "Except as provided in this section" to the beginning of the subsection, substituted "a municipality" for "an incorporated borough, city, or other public corporation of like character," and deleted "or for an injury to the rights of the plaintiff arising from some act or omission of the unit of local government" from the end of the subsection. In subsection (b), the amendment substituted "A municipality" for "An incorporated borough, city or other political subdivision" at the beginning of the subsection and substituted "it" for "the incorporated borough, city or other political subdivision" at the end of the subsection. The amendment also rewrote subsection (c) and added subsections (d) and (e).

Editor's note.--Section 4, ch. 37, SLA 1977, effective May 18, 1977 provides: "This Act applies to all legal actions filed after the effective date of this Act."

Legislative committee reports.--For report on ch. 19, SLA 1975 (FCCS HCSSB 53), see 1975 House Journal, p. 144. For report on ch. 215, SLA 1975 (HCS CSSB 257 am FCC), see 1975 House Journal, p. 1455.

C. Washington Government Liability. (Draft for Discussion)

October 24, 1978

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION: Section 1. The legislature finds that by the enactment of this act the legislature intends that the state and all municipal corporations, quasi-municipal corporations, and other political subdivisions of the state shall be liable for damages arising out of their direct tortious conduct, and that of their officers, agents, servants, and employees, where such conduct involves activities or functions performed both by such state and local governments and by persons and corporations in the private sector. It is not the intent of the legislature to extend liability such that it limits the effectiveness of state or local government in providing services and regulatory conduct to the detriment of the public health, welfare, and safety. It is specifically recognized that the threat of damage claims against state and local governments based on land use and permit decisions places detrimental constraints on the legitimate exercise of police powers. It is further recognized that it is impossible for state and local governments to afford the cost of the inspections and enforcement systems necessary to assure full compliance with all enactments. It is finally recognized that state and local governments cannot afford to update all highways, roads, streets, or sidewalks to meet optimal designs, and that users of such public facilities must recognize such limitation. It is therefore necessary to specifically designate certain functions and activities performed by state and local governments and to provide that neither the state, municipal corporations, quasi-municipal corporations, other political subdivisions of the state nor their officers, agents, servants, or employees, shall be held liable for damages resulting from their acts or omissions in the performance or non-performance of such functions or activities.

NEW SECTION: Section 2. Unless the context clearly requires otherwise, the definitions in this section shall apply throughout this act.

(1) "Enactment" means any constitutional provision, statute, charter provision, ordinance, resolution, regulation, or rule adopted by the state or a municipal corporation.

(2) "Governmental employee" means an officer, employee, agent, or servant of the state or a municipal corporation, including elected or appointed officials, and persons acting on behalf of the state or a municipal corporation in any official capacity, temporarily or permanently, whether or not compensated, but not including independent contractors or agents or employees of independent contractors.

(3) "Municipal corporation" means a city, town, county, special purpose district or other political subdivision, municipal corporation or quasi-municipal corporation.

(4) "Design" means plan, creation, existence, continuation in existence, formation, development, or alteration.

NEW SECTION: Section 3. Except as otherwise provided in Section 4 of this act, the State of Washington and all municipal corporations of the state whether acting in a governmental or proprietary capacity shall be liable for damages arising out of their tortious conduct to the same extent as if they were private persons or corporations; PROVIDED, That nothing in this section shall be construed to alter, amend or repeal any existing legislation unless expressly so stated.

NEW SECTION: Section 4. Neither the state, a municipal corporation, nor a governmental employee shall be liable on a claim for damages caused by or arising from any act or omission in the performance or non-performance of the following functions and activities:

(1) The issuance, conditional issuance, non-issuance, denial, suspension or revocation of any permit, license, franchise, certificate, order to desist, approval variance, zoning, rezoning, or like authorization;

(2) Inspections which are made for the purpose of determining another's compliance with any enactments; PROVIDED, That nothing in this subsection shall exonerate the state or municipal corporation from its responsibilities with respect to maintenance of its own property;

(3) The design of all features of highways, roads, streets or sidewalks; PROVIDED, That this subsection shall not be construed to include repair, upkeep, sanding, or the placement or absence of warning signs, and

(4) Nothing herein shall be construed to alter or change any immunities or areas of non-liability not referred to herein.

NEW SECTION: Section 5. If any provision of this 1979 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to such persons or circumstances shall be invalid except Section 6.

NEW SECTION: Section 6. The following acts or parts of acts are each repealed:

(1) Section 1, Chapter 136, Laws of 1961, Section 2, Chapter 159, Laws of 1963 and RCW 4.92.090; and

(2) Section 1, Chapter 161, Laws of 1967 and RCW 4.96.010.

II. SPECIAL CALIFORNIA LEGISLATION

A. California Emergency Services Act.

Chapter 7 of Division 1 of Title 2 of the Government Code, added at the 1970 Session (Stats. 1970, Ch. 1454), as amended effective January 1, 1975.

CHAPTER 7.
CALIFORNIA EMERGENCY SERVICES ACT

Article 1. Purpose

8550. The state has long recognized its responsibility to mitigate the effects of natural, manmade, or war-caused emergencies which result in conditions of disaster or in extreme peril to life, property, and the resources of the state, and generally to protect the health and safety and preserve the lives and property of the people of the state. To insure that preparations within the state will be adequate to deal with such emergencies, it is hereby found and declared to be necessary:

(a) To confer upon the Governor and upon the chief executives and governing bodies of political subdivisions of this state the emergency powers provided herein; and to provide for state assistance in the organization and maintenance of the emergency programs of such political subdivisions;

(b) To provide for a state agency to be known and referred to as the Office of Emergency Services, within the Governor's office; and to prescribe the powers and duties of the director of that office;

(c) To provide for the assignment of functions to state agencies to be performed during an emergency and for the coordination and direction of the emergency actions of such agencies;

(d) To provide for the rendering of mutual aid by the state government and all its departments and agencies and by the political subdivisions of this state in carrying out the purposes of this chapter;

(e) To authorize the establishment of such organizations and the taking of such actions as are necessary and proper to carry out the provisions of this chapter.

It is further declared to be the purpose of this chapter and the policy of this state that all emergency services functions of this state be coordinated as far as possible with the comparable functions of its political subdivisions, of the federal government including its various departments and agencies, of other states, and of private agencies of every type, to the end that the most effective use may be made of all manpower, resources, and facilities for dealing with any emergency that may occur.

8551. This chapter may be cited as the "California Emergency Services Act."

Article 2. General Definitions

8555. Unless the provision or context otherwise requires, the definitions contained in this article govern the construction of this chapter.

8556. "Governor" means the Governor or the person upon whom the powers and duties of the office of Governor have devolved pursuant to Section 10 of Article V of the California Constitution.

8557. (a) "Emergency Council" means the California Emergency Council.

(b) "State agency" means any department, division, independent establishment, or agency of the executive branch of the state government.

(c) "Political subdivision" includes any city, city and county, county, district, or other local governmental agency or public agency authorized by law.

(d) "Governing body" means the legislative body, trustees, or directors of a political subdivision.

(e) "Chief executive" means that individual authorized by law to act for the governing body of a political subdivision.

(f) "Disaster council" and "disaster service worker" have the meaning prescribed in Chapter 1 (commencing with Section 3201) of Part 1 of Division 4 of the Labor Code.

(g) "Public facility" means any facility of the state or a political subdivision, which facility is owned, operated, or maintained, or any combination thereof, through moneys derived by taxation or assessment.

8558. Three conditions or degrees of emergency are established by this chapter:

(a) "State of war emergency" means the condition which exists immediately, with or without a proclamation thereof by the Governor, whenever this state or nation is attacked by an enemy of the United States, or upon receipt by the state of a warning from the federal government indicating that such an enemy attack is probable or imminent.

(b) "State of emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused

by such conditions as air pollution, fire, flood, storm, epidemic, riot, or earthquake or other conditions, other than conditions resulting from a labor controversy or conditions causing a "state of war emergency," which conditions, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat.

(c) "Local emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the territorial limits of a county, city and county, or city, caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, or earthquake or other conditions, other than conditions resulting from a labor controversy, which conditions are or are likely to be beyond the control of the services, personnel, equipment, and facilities of that political subdivision and require the combined forces of other political subdivisions to combat.

8559. (a) A "mutual aid region" is a subdivision of the state emergency services organization, established to facilitate the coordination of mutual aid and other emergency operations within an area of the state consisting of two or more county operational areas.

(b) An "operational area" is an intermediate level of the state emergency services organization, consisting of a county and all political subdivisions within the county area.

8560. (a) "Emergency plans" means those official and approved documents which describe the principles and methods to be applied in carrying out emergency operations or rendering mutual aid during emergencies. These plans include such elements as continuity of government, the emergency services of governmental agencies, mobilization of resources, mutual aid, and public information.

(b) "State Emergency Plan" means the State of California Emergency Plan as approved by the Governor.

8561. "Master Mutual Aid Agreement" means the California Disaster and Civil Defense Master Mutual Aid Agreement, made and entered into by and between the State of California, its various departments and agencies, and the various political subdivisions of the state, to facilitate implementation of the purposes of this chapter.

Article 3. Powers of the Governor

8565. The Governor shall have the powers granted by this article, which powers shall be in addition to any other powers granted to him by this chapter.

8566. The Governor is empowered to expend any appropriation for support of the California Emergency Services Act to carry out the provisions of this chapter.

8567. (a) The Governor may make, amend, and rescind orders and regulations necessary to carry out the provisions of this chapter. Such orders and regulations shall have the force and effect of law. Due consideration shall be given to the plans of the federal government in preparing such orders and regulations. The Governor shall cause widespread publicity and notice to be given to all such orders and regulations, or amendments or rescissions thereof.

(b) Orders and regulations, or amendments or rescissions thereof, issued during a state of war emergency or state of emergency shall be in writing and shall take effect immediately upon their issuance. Whenever the state of war emergency or state of emergency has been terminated, such orders and regulations shall be of no further force or effect.

(c) All orders and regulations relating to the use of funds pursuant to Article 16 (commencing with Section 8645) of this chapter shall be prepared in advance of any commitment or expenditure of such funds. Other orders and regulations needed to carry out the provisions of this chapter shall, whenever practicable, be prepared in advance of a state of war emergency or state of emergency.

(d) All orders and regulations made in advance of a state of war emergency or state of emergency shall be in writing, shall be exempt from the provisions of Chapter 4.5 (commencing with Section 11371), Part 1, Division 3, Title 2, of the Government Code, but shall be subject to the approval of the Emergency Council. As soon thereafter as possible they shall be filed in the office of the Secretary of State and with the county clerk of each county.

8568. The State Emergency Plan shall be in effect in each political subdivision of the state, and the governing body of each political subdivision shall take such action as may be necessary to carry out the provisions thereof.

8569. The Governor shall coordinate the State Emergency Plan and those programs necessary for the mitigation of the effects of an emergency in this state; and he shall coordinate the preparation of plans and programs for the mitigation of the effects of an emergency by the political subdivisions of this state, such plans and programs to be integrated into and coordinated with the State Emergency Plan and the plans and programs of the federal government and of other states to the fullest possible extent.

8570. The Governor may, in accordance with the State Emergency Plan and programs for the mitigation of the effects of an emergency in this state:

(a) Ascertain the requirements of the state or its political subdivisions for food, clothing, and other necessities of life in the event of an emergency;

(b) Plan for, procure, and pre-position supplies, medicines, materials, and equipment;

(c) Use and employ any of the property, services, and resources of the state as necessary to carry out the purposes of this chapter;

(d) Provide for the approval of local emergency plans;

(e) Provide for mobile support units;

(f) Institute training programs and public information programs;

(g) Make surveys of such industries, resources, and facilities, both public and private, within the state, as are necessary to carry out the purposes of this chapter;

(h) Plan for the use of any private facilities, services, and property and, when necessary, and when in fact used, provide for payment for such use under such terms and conditions as may be agreed upon;

(i) Take all other preparatory steps, including the partial or full mobilization of emergency organizations in advance of an actual emergency; and order those test exercises needed to insure the furnishing of adequately trained and equipped personnel in time of need.

8571. During a state of war emergency or a state of emergency the Governor may suspend the provisions of any regulatory statute, or statute prescribing the procedure for conduct of state business, or the orders, rules, or regulations of any state agency, where the Governor determines and declares that strict compliance with the

provisions of any such statute, order, rule, or regulation would in any way prevent, hinder, or delay the mitigation of the effects of the emergency.

8572. In the exercise of the emergency powers hereby vested in him during a state of war emergency or state of emergency, the Governor is authorized to commandeer or utilize any private property or personnel deemed by him necessary in carrying out the responsibilities hereby vested in him as Chief Executive of the state and the state shall pay the reasonable value thereof.

Notwithstanding the provisions of this section, the Governor is not authorized to commandeer any newspaper, newspaper wire service, or radio or television station, but may, during a state of war emergency or state of emergency, and if no other means of communication are available, utilize any news wire services, and the state shall pay the reasonable value of such use. In so utilizing any such facilities, the Governor shall interfere as little as possible with their use for the transmission of news.

8573. The Governor may cooperate with the President and the heads of the armed forces and other agencies of the United States, and with officers and agencies of other states, on matters pertaining to emergencies; and he may take any steps he deems necessary to put into effect any rules, regulations, or suggestions made by such persons or agencies.

8574. None of the provisions of this chapter shall limit, modify, or abridge the powers vested in the Governor under the Constitution or statutes of the state by proclamation, to declare any county, city and county, or city, or any portion thereof to be in a state of insurrection or to proclaim the existence of martial law and to exercise all the powers vested in him thereunder independent of, or in conjunction with, any of the provisions of this chapter.

Article 3.5. Oil Spills

8574.1. In addition to any other authority conferred upon the Governor by this chapter, the Governor may establish a state oil spill contingency plan pursuant to the provisions of this article. (Stats. 1972. Ch. 1325.)

8574.2. Any plan established pursuant to this article shall provide for an integrated and effective state procedure to combat the results of major oil spills within the state. Such plan shall provide for specified state agencies to implement the plan. (Stats. 1972, Ch. 1325.)

8574.3. State agencies granted authority to implement a plan adopted under this article shall have the authority to use volunteer workers. Such volunteers shall be deemed employees of the state for the purpose of workmen's compensation under Article 2 (commencing with Section 3350) of Chapter 2 of Part 1 of Division 4 of the Labor Code. Any payments for workmen's compensation under this section shall be made from the account specified in Section 8574.4. (Stats. 1972, Ch. 1325.)

8574.4. State agencies designated to implement the contingency plan shall account for all state expenditures made under the plan with respect to each oil spill. Expenditures accounted for under this section shall be paid for from the State Water Pollution Cleanup and Abatement Account of the State Water Quality Control Fund provided for in Article 3 (commencing with Section 13440) of Chapter 6 of Division 7 of the Water Code. If the party responsible for the spill is identified, that party shall be liable for the expenditures accounted for under this section, in addition to any other liability which may be provided for by law, in an action brought by the Attorney General. The proceeds from any such action shall be paid into the State Water Pollution Cleanup and Abatement Account of the State Water Quality Control Fund. (Stats. 1972, Ch. 1325.)

Article 4. California Emergency Council

8575. There is hereby created a California Emergency Council, to consist of the following:

(a) The Governor, or an alternate appointed by him;

(b) The Lieutenant Governor, or an alternate appointed by him;

(c) The Attorney General, or an alternate appointed by him;

(d) One representative of the city governments of the state and one representative of the county governments of the state, to be appointed by the Governor and to serve at his pleasure, provided these members shall be from different counties;

(e) One representative of the American National Red Cross, to be appointed by the Governor;

(f) One representative of the city or county fire services of the state and one representative of the city or county law enforcement services of the state, to be appointed by the Governor and to serve at his pleasure, provided these members shall be from different counties.

The President pro Tempore of the Senate and the Speaker of the Assembly shall meet with and participate in the work of the Emergency Council to the same extent as members of the council appointed by the Governor, excepting when such participation is constitutionally incompatible with their respective positions as Members of the Legislature.

If the President pro Tempore of the Senate does not desire to serve on the Emergency Council, the Senate Rules Committee may appoint a Member of the Senate to serve in his stead. If the Speaker of the Assembly does not desire to serve on the Emergency Council, he may appoint a Member of the Assembly to serve in his stead.

8576. The Governor shall be ex officio Chairman of the Emergency Council.

8577. Neither the members of the Emergency Council nor the Members of the Legislature shall receive compensation for their services under this chapter, but they shall be reimbursed for their actual and necessary expenses incurred in connection with their duties hereunder.

8578. The Emergency Council shall meet upon call of the Governor, not less frequently than annually. Except during a state of war emergency or a state of emergency, notice of such meeting shall be given to each member not less than 15 days prior to the day selected by the Governor for the meeting of the Emergency Council.

8579. It shall be the duty of the Emergency Council, and it is hereby empowered, to act as an advisory body to the Governor in times of emergency and with reference thereto in order to minimize the effects of such occurrences by recommending ameliorative action.

The powers and duties of the Emergency Council shall include the following:

(a) To consider, recommend, and approve orders and regulations which are within the province of the Governor to promulgate;

(b) To consider and recommend to the Governor for approval the boundaries of such mutual aid regions of the state as may be designated:

(c) To recommend to the Governor the assignment of any responsibility, service, or activity relative to emergencies or emergency planning to a state agency having duties related to such responsibility, service, or activity;

(d) To consider and recommend the creation by the Governor of advisory committees in order to make civilian participation and cooperation in emergency planning and activities available to the state;

(e) To consider and recommend the expenditures of moneys appropriated for any of the objectives or purposes of this chapter;

(f) To consider and recommend to the Governor for approval a State Emergency Plan built around mutual aid and the integration into such plan of the several state agencies whose resources are necessary in coping with emergencies;

(g) To certify the accredited status of local disaster councils;

(h) To encourage the development and maintenance of emergency plans based on mutual aid, whereunder political subdivisions may most effectively protect life and property and mitigate other effects of emergencies;

(i) To evaluate and report to the Governor on state communications systems with particular regard to their adequacy in case of emergency.

8580. The Emergency Council shall establish by rule and regulation various classes of disaster service workers and the scope of the duties of each class. The Emergency Council shall also adopt rules and regulations prescribing the manner in which disaster service workers of each class are to be registered. All such rules and regulations shall be designed to facilitate the paying of workmen's compensation.

8581. At any time when the Emergency Council is not meeting the Governor may certify the accredited status of local disaster councils, subject to the requirements of Section 8612. Such certification shall be final for all purposes, subject to the power of the Emergency Council to set aside such certification and exercise the authority granted to it by this chapter.

At each meeting of the Emergency Council, the Governor shall report to it any action taken by him pursuant to this section subsequent to its last meeting.

8582. Nothing herein shall operate to prevent the Governor from establishing a committee or board composed of heads of state agencies, should he deem it necessary to aid him or the Emergency Council or both in obtaining information or advice, assisting in developing or carrying out plans, or otherwise acting in accomplishment of the purposes of this chapter.

Article 5. Office of Emergency Services

8585. There is in the office of the Governor the Office of Emergency Services, which office is the State Civil Defense Agency. The Director of the Office of Emergency Services, who shall also be the State Director of Civil Defense and the State Director of Emergency Planning, shall be in charge of the Office of Emergency Services and shall have all the rights and powers of a head of a department as provided by the Government Code.

The Director of the Office of Emergency Services shall be appointed by the Governor with the consent of the Senate, and shall serve at the pleasure of the Governor. The Governor shall also appoint a Deputy Director of the Office of Emergency Services who shall serve at the pleasure of the Governor. The Director and Deputy Director of the Disaster Office on the effective date of this section shall continue to serve as the Director and Deputy Director, respectively, of the Office of Emergency Services until their successors are appointed and qualified.

The Director of the Office of Emergency Services shall receive an annual salary as provided for by Chapter 6 (commencing with Section 11550) of Part 1 of Division 3 of Title 2 of the Government Code.

8586. The Governor shall assign all or part of his powers and duties under this chapter to the Office of Emergency Services.

The Director of the Office of Emergency Services shall appoint pursuant to the State Civil Service Act such employees as are needed.

8587. During a state of war emergency, a state of emergency, or a local emergency, the director shall coordinate the emergency activities of all state agencies in connection with such emergency, and every state agency and officer shall cooperate with the director in rendering all possible assistance in carrying out the provisions of this chapter.

In addition to the powers herein designated, the Governor may delegate any of the powers vested in him under this chapter to the Director of the Office of Emergency Services except the power to make, amend, and rescind orders and regulations, and the power to proclaim a state of emergency.

8588. Whenever conditions exist within any region or regions of the state which warrant the proclamation by the Governor of a state of emergency and the Governor has not acted under the provisions of Section 8625, by reason of the fact that he has been inaccessible, the Director of the Office of Emergency Services may proclaim the existence of a state of emergency in the name of the Governor as to any region or regions of the state. Whenever the Director of the Office of Emergency Services has so proclaimed a state of emergency, such action shall be ratified by the Governor as soon as he becomes accessible, and in the event the Governor does not ratify the action he shall immediately terminate the state of emergency as proclaimed by the Director of the Office of Emergency Services.

8589. The Office of Emergency Services shall be permitted such use of all state and local fair properties as conditions require.

8589.5 (a) Inundation maps showing the areas of potential flooding in the event of sudden or total failure of any dam, the partial or total failure of which the Office of Emergency Services determines, after consultation with the Department of Water Resources, would result in death or personal injury, shall be prepared and submitted as provided in this subdivision within six months after the effective date of this section, unless the time for submission of such maps is extended for reasonable cause by the Office of Emergency Services. The local governmental organization, utility, or other owner of any dam so designated shall submit to the Office of Emergency Services one such map which shall delineate potential flood zones

that could result in the event of dam failure when the reservoir is at full capacity or if the local governmental organization, utility, or other owner of any dam shall determine it to be desirable he shall submit three such maps, which shall delineate potential flood zones that could result in the event of dam failure when the reservoir is at full capacity, at median-storage level, and at normally low-storage level. After submission of copies of such map or maps, the Office of Emergency Services shall review the map or maps, and shall return that map or maps which do not meet the requirements of this subdivision, together with recommendations relative to conforming to such provisions. Maps rejected by the Office of Emergency Services shall be revised to conform to such recommendations and resubmitted. The Office of Emergency Services shall keep on file those maps which conform to the provisions of this subdivision. Maps approved pursuant to this subdivision shall also be kept on file with the Department of Water Resources. The owner of a dam shall submit final copies of such maps to the Office of Emergency Services which shall immediately submit identical copies to the appropriate public safety agency of any city, county, or city and county likely to be affected.

(b) Based upon a review of inundation maps submitted pursuant to subdivision (a) or based upon information gained by an onsite inspection and consultation with the affected local jurisdiction when the requirement for an inundation map is waived pursuant to subdivision (d), the Office of Emergency Services shall designate areas within which death or personal injury would, in its determination, result from the partial or total failure of a dam. The appropriate public safety agencies of any city, county, or city and county, the territory of which includes such an area, shall adopt emergency procedures for the evacuation and control of populated areas below such dams. The Office of Emergency Services shall review such procedures to determine whether adequate public safety measures exist for the evacuation and control of populated areas below the dams, and shall make recommendations with regard to the adequacy of such procedures to the concerned public safety agency. In conducting such review the Office of Emergency Services shall consult with appropriate state and local agencies.

Emergency procedures specified in this subdivision shall conform to local needs, and may be required to include any of the following elements or any other appropriate element, in the discretion of the Office of Emergency Services: (1) delineation of area to be evacuated; (2) routes to be used; (3) traffic control measures; (4) shelters to be activated for the care of the evacuees; (5) methods for the movement of people without their own transportation; (6) identification of particular areas or facilities in the flood zones which will not require evacuation because of their location on high ground or similar circumstances; (7) identification and development of special procedures for the evacuation and care of people from unique institutions; (8) procedures for the perimeter and interior security of the area, including such things as passes, identification requirements, and antilooting patrols; (9) procedures for the lifting of the evacuation and reentry of the area; and (10) details of which organizations are responsible for these functions and the material and personnel resources required. It is the intent of the Legislature to encourage each agency that prepares such emergency procedures to establish a procedure for their review every two years.

(c) "Dam," as used in this section, has the same meaning as specified in Sections 6002, 6003, and 6004 of the Water Code.

(d) Under certain exceptional conditions as follows, the Office of Emergency Services may waive the requirement for an inundation map:

(1) Where the effects of potential inundation in terms of death or personal injury as determined through onsite inspection by the Office of Emergency Services in consultation with the affected local jurisdictions, can be ascertained without an inundation map; and

(2) Where adequate evacuation procedures can be developed without benefit of an inundation map.

(e) If development should occur in any exempted area after a waiver has been granted, the local jurisdiction shall notify the Office of Emergency Services of such development. All waivers shall be reevaluated every two years by the Office of Emergency Services. (Stats. 1972, Ch. 780, as amended by Stats. 1974, Ch. 314.)

Article 6. Advisory Committees

8590. The Governor may create advisory committees to assist in specific fields related to emergency services and recovery. He shall appoint the members thereof and they shall serve at his pleasure. He shall also designate the chairman and vice chairman thereof. The committees shall be under the direction of the Governor or such state agency head as he shall designate, and shall be wholly advisory in character and shall not be delegated any administrative authority or responsibility. Members of such committees shall not receive compensation from the state for their services under this chapter, but when called into conference or session by the Governor or a department head designated by him shall be reimbursed for their actual and necessary expenses incurred in connection with such conference or session.

8591. Nothing herein shall operate to prevent the Governor or the Director of the Office of Emergency Services from formally recognizing committees or boards established by or with segments of the private sector, or public agencies or both the private sector and public agencies which control facilities, resources, or the provision of services essential to the mitigation of the effects of an emergency or recovery therefrom, or from assigning administrative authority or responsibility to such committees or boards or to members thereof with respect to the provision and effective utilization of such resources to meet needs resulting from an emergency.

Article 7. Other State Agencies

8595. The Governor may assign to a state agency any activity concerned with the mitigation of the effects of an emergency of a nature related to the existing powers and duties of such agency, including interstate activities, and it shall thereupon become the duty of such agency to undertake and carry out such activity on behalf of the state.

8596. (a) Each department, division, bureau, board, commission, officer, and employee of this state shall render all possible assistance to the Governor and to the Director of the Office of Emergency Services in carrying out the provisions of this chapter.

(b) In providing such assistance, state agencies shall cooperate to the fullest possible extent with each other and with political subdivisions, relief agencies, and the American National Red Cross, but nothing contained in this chapter shall be construed to limit or in any way affect the responsibilities of the American National Red Cross under the federal act approved January 5, 1905 (33 Stat. 599), as amended.

(c) State personnel, equipment, and facilities may be used to clear and dispose of debris on private property only after the Governor finds: (1) that such use is for a state purpose; (2) that such use is in the public interest, serving the general welfare of the state; and (3) that such personnel, equipment, and facilities are already in the emergency area.

8597. Whenever a state of emergency is proclaimed to exist within any region or area, or whenever a state of war emergency exists, the following classes of state employees who are within the region or area proclaimed or who may be assigned to duty therein shall be peace officers and shall have the full powers and duties of such officers for all purposes as provided by Section 830.1 of the Penal Code, and shall perform such duties and exercise such powers as are appropriate or as may be directed by their superior officers:

(a) All members of the California Highway Patrol.

(b) All deputies of the Department of Fish and Game who have been appointed to enforce the provisions of the Fish and Game Code pursuant to Section 851 of that code.

(c) The State Forester and the classes of the Division of Forestry who are designated by the State Forester as having the powers of peace officers pursuant to Section 4156 of the Public Resources Code.

(d) All members of the California State Police Division.

(e) Peace officers who are state employees within the provisions of Section 830.5 of the Penal Code. (Stats. 1970, Ch. 1454, as amended by Stats. 1972, Ch. 198.)

8598. Whenever a local emergency exists within a region or area of the state and the California Highway Patrol, the California State Police Division, or the Department of Corrections or the Department of the Youth Authority employing any peace officer within Section 830.5 of the Penal Code is requested by properly constituted local authorities to assist local law enforcement, the officers assigned to assist within the designated regions or areas shall have the full powers of peace officers within the meaning of Section 830.1 of the Penal Code and shall perform such duties and exercise such powers as are appropriate or as may be directed by their superior officers. (Stats. 1970, Ch. 1454, as amended by Stats. 1972, Ch. 198.)

Article 8. Mutual Aid Regions

8600. The Governor with the advice of the Emergency Council is hereby authorized and empowered to divide the state into mutual aid regions for the more effective application, administration, and coordination of mutual aid and other emergency-related activities.

Article 9. Operational Areas

8605. Each county is designated as an operational area. In a state of war emergency each operational area shall serve as a link in the system of communications and coordination between the state's emergency operating centers and the operating centers of the political subdivisions comprising the operational area.

The governing bodies of each county and of the political subdivisions in the county may organize and structure their operational area.

An operational area may be used by the county and the political subdivisions comprising the operational area for the coordination of emergency activities and to serve as a link in the communications system during a state of emergency or a local emergency.

Article 10. Local Disaster Councils

8610. Counties, cities and counties, and cities may create disaster councils by ordinance. A disaster council shall develop plans for meeting any condition constituting a local emergency, state of emergency, or state of war emergency; such plans shall provide for the effective mobilization of all of the resources within the political subdivision, both public and private. The governing body of a county, city and county, or city may, in such ordinance or by resolution adopted pursuant to such ordinance, provide for the organization, powers and duties, divisions, services, and staff of the emergency organization. The governing body of a county, city and county, or city may, by ordinance or resolution, authorize public officers, employees, and registered volunteers to command the aid of citizens when necessary in the execution of their duties during a state of war emergency, a state of emergency, or a local emergency.

Counties, cities and counties, and cities may enact ordinances and resolutions and either establish rules and regulations or authorize disaster councils to recommend to the director of the local emergency organization rules and regulations for dealing with local emergencies that can be adequately dealt with locally; and further may act to carry out mutual aid on a voluntary basis and, to this end, may enter into agreements. (Stats. 1970, Ch. 1454, as amended by Stats. 1974, Ch. 1158.)

8611. Counties, cities and counties, and cities may provide for the calling of test exercises, either singularly or jointly, whenever, in the opinion of such political subdivisions, such test exercises are needed; provided, however, that with respect to any such test exercise no one shall have the power to command the assistance of any private citizen, and the failure of a citizen to obey any order or regulation pertaining to a test exercise shall not constitute a violation of any law.

8612. Any disaster council which both agrees to follow the rules and regulations established by the Emergency Council pursuant to the provisions of Section 8580 and substantially complies with such rules and regulations shall be certified by the Emergency Council. Upon such certification, and not before, the disaster council becomes an accredited disaster council.

8613. Should an accredited disaster council fail to comply with the rules and regulations of the Emergency Council in any material degree, the Emergency Council may revoke its certification and, upon the act of revocation, the disaster council shall lose its accredited status. It may again become an accredited disaster council in the same manner as is provided for a disaster council which has not previously been accredited.

8614. (a) Each department, division, bureau, board, commission, officer, and employee of each political subdivision of the state shall render all possible assistance to the Governor and to the Director of the Office of Emergency Services in carrying out the provisions of this chapter.

(b) The emergency power which may be vested in a local public official during a state of war emergency or a state of emergency shall be subject or subordinate to the powers herein vested in the Governor when exercised by the Governor.

(c) Ordinances, orders, and regulations of a political subdivision shall continue in effect during a state of war emergency or a state of emergency except as to any provision suspended or superseded by an order or regulation issued by the Governor.

Article 11. Mutual Aid

8615. It is the purpose of the Legislature in enacting this article to facilitate the rendering of aid to areas stricken by an emergency and to make unnecessary the execution of written agreements customarily entered into by public agencies exercising joint powers. Emergency plans duly adopted and approved as provided by the Governor shall be effective as satisfying the requirement for mutual aid operational plans provided in the Master Mutual Aid Agreement.

8616. During any state of war emergency or state of emergency when the need arises for outside aid in any county, city and county, or city, such aid shall be rendered in accordance with approved emergency plans.

It shall be the duty of public officials to cooperate to the fullest possible extent in carrying out such plans.

8617. In periods other than a state of war emergency, a state of emergency, or a local emergency, state agencies and political subdivisions have authority to exercise mutual aid powers in accordance with the Master Mutual Aid Agreement and local ordinances, resolutions, agreements, or plans therefor.

8618. Unless otherwise expressly provided by the parties, the responsible local official in whose jursidiction an incident requiring mutual aid has occurred shall remain in charge at such incident, including the direction of personnel and equipment provided him through mutual aid.

8619. The Governor may on behalf of this state enter into reciprocal aid agreements or compacts, mutual aid plans, or other interstate arrangements for the protection of life and property with other states and the federal government, either on a statewide basis or a political subdivision basis. Prior to committing the personnel, equipment, or facilities of any political subdivision of this state, the Governor shall consult with the chief executive or governing body of such political subdivision. Such mutual aid arrangements may include the furnishing or exchange, on such terms and conditions as are deemed necessary, of supplies, equipment, facilities, personnel, and services.

Article 12. State of War Emergency

8620. During a state of war emergency the Governor shall have complete authority over all agencies of the state government and the right to exercise within the area or regions designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. In exercise thereof he shall promulgate, issue, and enforce such orders and regulations as he deems necessary for the protection of life and property, in accordance with the provisions of Section 8567.

8621. During a state of war emergency every department, commission, agency, board, officer, and employee of the state government and of every political subdivision, county, city and county, or city, public district, and public corporation of or in the state is required to comply with the lawful orders and regulations of the Governor made or given within the limits of his authority as provided for herein. Every such officer or employee who refuses or willfully neglects to obey any such order or regulation of the Governor, or who willfully resists, delays, or obstructs the Governor in the discharge of any of his functions hereunder, is guilty of a misdemeanor. In the event that any such officer or employee shall refuse or willfully neglect to obey any such order or regulation, the Governor may by his order temporarily suspend him from the performance of any and all the rights, obligations, and duties of his office or position for the remainder of the period of the state of war emergency, and the Governor may thereupon designate the person who shall carry on the rights, obligations, and duties of the office or position for the duration of such suspension.

8622. During a state of war emergency, the Governor, any state agency, or any agency acting under the authority of this chapter may exercise outside the territorial limits of this state any of the powers conferred upon him or it by or pursuant to this chapter.

8623. During a state of war emergency, any person holding a license, certificate, or other permit issued by any state evidencing the meeting of the qualifications of such state for professional, mechanical, or other skills, may render aid involving such skill to meet the emergency as fully as if such license, certificate, or other permit had been issued in this state if a substantially similar license, certificate, or other permit is issued in this state to applicants possessing the same professional, mechanical, or other skills.

8624. (a) Whenever it appears that a state of war emergency will continue for more than seven days, the Governor shall call a meeting of the Emergency Council not later than the seventh day.

(b) All of the powers granted the Governor by this chapter with respect to a state of war emergency shall terminate when:

(1) The state of war emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end; or

(2) The Governor has failed to call a meeting of the Emergency Council within the period prescribed in subdivision (a) of this section; or

(3) The Governor has not within 30 days after the beginning of such state of war emergency issued a call for a special session of the Legislature for the purpose of legislating on subjects relating to such state of war emergency, except when the Legislature is already convened with power to legislate on such subjects.

Article 13. State of Emergency

8625. The Governor is hereby empowered to proclaim

a state of emergency in an area affected or likely to be affected thereby when:

(a) He finds that circumstances described in subdivision (b) of Section 8558 exist; and either

(b) He is requested to do so (1) in the case of a city by the mayor or chief executive, (2) in the case of a county by the chairman of the board of supervisors or the county administrative officer; or

(c) He finds that local authority is inadequate to cope with the emergency.

8626. Such proclamation shall be in writing and shall take effect immediately upon its issuance. As soon thereafter as possible such proclamation shall be filed in the office of the Secretary of State. The Governor shall cause widespread publicity and notice to be given such proclamation.

8627. During a state of emergency the Governor shall, to the extent he deems necessary, have complete authority over all agencies of the state government and the right to exercise within the area designated all police power vested in the state by the Constitution and laws of the State of California in order to effectuate the purposes of this chapter. In exercise thereof, he shall promulgate, issue, and enforce such orders and regulations as he deems necessary, in accordance with the provisions of Section 8567.

8628. During a state of emergency the Governor may direct all agencies of the state government to utilize and employ state personnel, equipment, and facilities for the performance of any and all activities designed to prevent or alleviate actual or threatened damage due to the emergency; and he may direct such agencies to provide supplemental services and equipment to political subdivisions to restore any services which must be restored in order to provide for the health and safety of the citizens of the affected area. Any agency so directed by the Governor may expend any of the moneys which have been appropriated to it in performing such activities, irrespective of the particular purpose for which the money was appropriated.

8629. The Governor shall proclaim the termination of a state of emergency at the earliest possible date that conditions warrant. All of the powers granted the Governor by this chapter with respect to a state of emergency shall terminate when the state of emergency has been terminated by proclamation of the Governor or by concurrent resolution of the Legislature declaring it at an end.

Article 14. Local Emergency

8630. A local emergency may be proclaimed only by the governing body of a county, city and county, or city or by an official so designated by ordinance adopted by such governing body. Whenever a local emergency is proclaimed by an official designated by ordinance, the local emergency shall not remain in effect for a period in excess of seven days unless it has been ratified by the governing body. The governing body shall review, at least every 14 days until such local emergency is terminated, the need for continuing the local emergency and shall proclaim the termination of such local emergency at the earliest possible date that conditions warrant.

8631. In periods of local emergency, political subdivisions have full power to provide mutual aid to any affected area in accordance with local ordinances, resolutions, emergency plans, or agreements therefor.

8632. State agencies may provide mutual aid, including personnel, equipment, and other available resources, to assist political subdivisions during a local emergency or in accordance with mutual aid agreements or at the direction of the Governor.

8633. In the absence of a state of war emergency or state of emergency, the cost of extraordinary services incurred by political subdivisions in executing mutual aid agreements shall constitute a legal charge against the state when approved by the Governor in accordance with orders and regulations promulgated as prescribed in Section 8567.

8634. During a local emergency the governing body of a political subdivision, or officials designated thereby, may promulgate orders and regulations necessary to provide for the protection of life and property, including orders or regulations imposing a curfew within designated boundaries where necessary to preserve the public order and safety. Such orders and regulations and amendments and rescissions thereof shall be in writing and shall be given widespread publicity and notice.

The authorization granted by this chapter to impose a curfew shall not be construed as restricting in any manner the existing authority of counties and cities and any city and county to impose pursuant to the police power a curfew for any other lawful purpose.

Article 15. Preservation of Local Government

8635. The Legislature recognizes that if this state or nation were attacked by an enemy of the United States, many areas of California might be subjected to the effects of an enemy attack and some or all of these areas could be severely damaged. During such attacks and in the reconstruction period following such attacks, law and order must be preserved and so far as possible government services must be continued or restored. This can best be done by civil government. To help to preserve law and order and to continue or restore local services, it is essential that the local units of government continue to function.

In enacting this article the Legislature finds and declares that the preservation of local government in the event of enemy attack or in the event of a state of emergency or a local emergency is a matter of statewide concern. The interdependence of political subdivisions requires that, for their mutual preservation and for the protection of all the citizens of the State of California, all political subdivisions have the power to take the minimum precautions set forth in this article. The purpose of this article is to furnish a means by which the continued functioning of political subdivisions will be assured. Should any part of this article be in conflict with or inconsistent with any other part of this chapter, the provisions of this article shall control.

Nothing in this article shall prevent a city or county existing under a charter from amending said charter to provide for the preservation and continuation of its government in the event of a state of war emergency. (Stats. 1970, Ch. 1454, as amended by Stats. 1974, Ch. 595.)

8636. As used in this article, "unavailable" means that an officer is either killed, missing, or so seriously injured as to be unable to attend meetings and otherwise perform his duties. Any question as to whether a particular officer is unavailable shall be settled by the governing body of the political subdivision or any remaining available members of said body (including standby officers who are serving on such governing body).

8637. Each political subdivision may provide for the succession of officers who head departments having duties in the maintenance of law and order or in the furnishing of public services relating to health and safety.

8638. To provide for the continuance of the legislative and executive departments of the political subdivision during a state of war emergency or a state of emergency or a local emergency the governing body thereof shall have the power to appoint the following standby officers:

(a) Three for each member of the governing body.

(b) Three for the chief executive, if he is not a member of the governing body.

In case a standby office becomes vacant because of removal, death, resignation, or other cause, the governing body shall have the power to appoint another person to fill said office.

Standby officers shall be designated Nos. 1, 2, and 3 as the case may be. (Stats. 1970, Ch. 1454, as amended by Stats. 1974, Ch. 595.)

8639. The qualifications of each standby officer should be carefully investigated, and the governing body may request the Director of the Office of Emergency Services to aid in the investigation of any prospective appointee. No examination or investigation shall be made without the consent of the prospective appointee.

Consideration shall be given to places of residence and work, so that for each office for which standby officers are appointed there shall be the greatest probability of survivorship. Standby officers may be residents or officers of a political subdivision other than that to which they are appointed as standby officers.

8640. Each standby officer shall take the oath of office required for the officer occupying the office for which he stands by. Persons appointed as standby officers shall serve in their posts as standby officers at the pleasure of the governing body appointing them and may be removed and replaced at any time with or without cause.

8641. Each standby officer shall have the following duties:

(a) To inform himself of the duties of the office for which he stands by. Officers and employees of the political subdivision shall assist him and each political subdivision shall provide each standby officer with a copy of this article.

(b) To keep informed of the business and affairs of the political subdivision to the extent necessary to enable him to fill his post competently. For this purpose the political subdivision may arrange information meetings and require attendance.

(c) To immediately report himself ready for duty in the event of a state of war emergency or in the event of a state of emergency or a local emergency at the place and in the method previously designated by the political subdivision.

(d) To fill the post for which he has been appointed when the regular officer is unavailable during a state of war emergency. Standby officers Nos. 2 and 3 shall substitute in succession for standby officer No. 1 in the same way that said standby officer is substituted in place of the regular officer. He shall serve until the regular officer becomes available or until the election or appointment of a new regular officer. (Stats. 1970, Ch. 1454, as amended by Stats. 1974, Ch. 595.)

8642. Whenever a state of war emergency or a state of emergency or a local emergency exists the governing body of the political subdivision shall meet as soon as possible. The place of meeting need not be within the political subdivision. The meeting may be called by the chief executive of the political subdivision or by a majority of the members of the governing body. Should there be only one member of the governing body, he may call and hold said meeting and perform acts necessary to reconstitute the governing body. (Stats. 1970, Ch. 1454, as amended by Stats. 1974, Ch. 595.)

8643. During a state of war emergency or a state of emergency or a local emergency the governing body shall:

(a) Ascertain the damage to the political subdivision and its personnel and property. For this purpose it shall have the power to issue subpoenas to compel the attendance of witnesses and the production of records.

(b) Proceed to reconstitute itself by filling vacancies until there are sufficient officers to form the largest quorum required by the law applicable to that political subdivision. Should only one member of the governing body or only one standby officer be available, that one shall have power to reconstitute the governing body.

(c) Proceed to reconstitute the political subdivision by appointment of qualified persons to fill vacancies.

(d) Proceed to perform its functions in the preservation of law and order and in the furnishing of local services. (Stats. 1970, Ch. 1454, as amended by Stats. 1974, Ch. 595.)

8644. Should all members of the governing body, including all standby members, be unavailable, temporary officers shall be appointed to serve until a regular member or a standby member becomes available or until the election or appointment of a new regular or standby member. Temporary officers shall be appointed as follows:

(a) By the chairman of the board of supervisors of the county in which the political subdivision is located, and if he is unavailable,

(b) By the chairman of the board of supervisors of any other county within 150 miles of the political subdivision, beginning with the nearest and most populated county and going to the farthest and least populated, and if he is unavailable,

(c) By the mayor of any city within 150 miles of the political subdivision, beginning with the nearest and most populated city and going to the farthest and least populated.

Article 16. General Fiscal Provisions

8645. In addition to any appropriation made to support activities contemplated by this chapter, the Governor is empowered to make expenditures from any fund legally available in order to deal with actual or threatened conditions of a state of war emergency, state of emergency, or local emergency.

8646. In carrying out the provisions of this chapter, the Governor may:

(a) Procure and maintain offices in such parts of the state as may be necessary or convenient;

(b) Acquire property, real or personal, or any interest therein;

(c) Cooperate and contract with public and private agencies for the performance of such acts, the rendition of such services, and the affording of such facilities as may be necessary and proper;

(d) Do such other acts and things as may be necessary and incidental to the exercise of powers and the discharge of duties conferred or imposed by the provisions of this chapter.

8647. (a) Whenever the federal government or any agency or officer thereof shall offer to the state, or through the state to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant, or loan, for purposes of the mitigation of the effects of an emergency, the state, acting through the Governor, or such political subdivision, acting with the consent of the Governor and through its chief executive or governing body, may accept such offer.

(b) Whenever any person, firm, or corporation shall offer to the state or to any political subdivision thereof, services, equipment, supplies, materials, or funds by way of gift, grant, or loan, for purposes of the mitigation of the effects of an emergency, the state, acting through the Governor, or such political subdivision, acting through its chief executive or governing body, may accept such offer.

(c) Upon acceptance, the Governor of the state or the chief executive or governing body of such political subdivision may authorize any officer of the state or of the political subdivision, as the case may be, to receive such services, equipment, supplies, materials, or funds on behalf of the state or such political subdivision, subject to the terms of the offer and subject to the rules and regulations, if any, of a federal agency making such offer.

8648. The Governor may reimburse any state agency for funds expended in the performance of any and all activities as set forth in Section 8628 in accordance with orders and regulations promulgated as prescribed in Section 8567. Such reimbursement shall be subject to the provisions of Section 8649.

8649. Subject to the approval of the Department of Finance, any state agency may use its personnel, property, equipment, and appropriations for carrying out the purposes of this chapter and in that connection may loan personnel to the Office of Emergency Services. The Department of Finance shall determine whether reimbursement shall be made to any state agency for expenditures heretofore or hereafter made or incurred for such purposes from any appropriation available for the Office of Emergency Services, except that as to any expenditure made or incurred by any state agency the funds of which are subject to constitutional restriction which would prohibit their use for such purposes, such reimbursement shall be provided and the original expenditure shall be considered a temporary loan to the General Fund of the state.

8650. Any funds received by state agencies as reimbursement for services or supplies furnished under the authority of this chapter shall be deposited to the credit of the appropriation or appropriations from which the expenditures were made.

8651. The Director of the Office of Emergency Services may procure from the federal government or any of its agencies such surplus equipment, apparatus, supplies, and storage facilities therefor as may be necessary to accomplish the purposes of this chapter.

8652. Before payment may be made by the state to any person in reimbursement for taking or damaging private property necessarily utilized by the Governor in carrying out his responsibilities under this chapter during a state of war emergency or state of emergency, or for services rendered at the instance of the Governor under said conditions, such person must present a claim to the State Board of Control in accordance with the provisions of the Government Code governing the presentation of claims against the state for the taking or damaging of private property for public use, which provisions shall govern the presentment, allowance, or rejection of such claims and the conditions upon which suit may be brought against the state. Payment for such property or services shall be made from any funds appropriated by the state for such purpose.

8653. In the event that the Governor, during a state of war emergency or a state of emergency and in the exercise of the emergency powers vested in him, shall order the officers, employees, or agencies of any county, city and county, city, or district to perform duties outside of the territorial limits of their respective agencies, any services performed or expenditures made in connection therewith by any such agency shall be deemed conclusively to be for the direct protection and benefit of the inhabitants and property of such agency. During a state of war emergency or a state of emergency in the event that any equipment owned, leased, or operated by any county, city and county, city, or district, is damaged or destroyed while being used outside of the territorial limits of the public agency owning such equipment, the public agency suffering loss shall be entitled to file a claim for the amount thereof against the State of California in the manner provided in Section 8652. Such agency shall have no claim against the state for services of such personnel or for the rental, use, or ordinary wear and tear of such equipment, except such extraordinary services incurred by local governmental agencies in executing mutual aid agreements.

Article 17. Privileges and Immunities

8655. The state or its political subdivisions shall not be liable for any claim based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a state or local agency or any employee of the state or its political subdivisions in carrying out the provisions of this chapter.

8656. All of the privileges and immunities from liability; exemptions from laws, ordinances, and rules; all pension, relief, disability, workmen's compensation, and other benefits which apply to the activity of officers, agents, or employees of any political subdivision when performing their respective functions within the territorial limits of their respective political subdivisions, shall apply to them to the same degree and extent while engaged in the performance of any of their functions and duties extraterritorially under the provisions of this chapter.

8657. (a) Volunteers duly enrolled or registered with the Office of Emergency Services or any disaster council of any political subdivision, or unregistered persons duly impressed into service during a state of war emergency, a state of emergency, or a local emergency, in carrying out, complying with, or attempting to comply with, any order or regulation issued or promulgated pursuant to the provisions of this chapter or any local ordinance, or

performing any of their authorized functions or duties or training for the performance of their authorized functions or duties, shall have the same degree of responsibility for their actions and enjoy the same immunities as officers and employees of the state and its political subdivisions performing similar work for their respective entities.

(b) No political subdivision or other public agency under any circumstances, nor the officers, employees, agents, or duly enrolled or registered volunteers thereof, or unregistered persons duly impressed into service during a state of war emergency, a state of emergency, or a local emergency, acting within the scope of their official duties under this chapter or any local ordinance shall be liable for personal injury or property damage sustained by any duly enrolled or registered volunteer engaged in or training for emergency preparedness or relief activity, or by any unregistered person duly impressed into service during a state of war emergency, a state of emergency, or a local emergency and engaged in such service. The foregoing shall not affect the right of any such person to receive benefits or compensation which may be specifically provided by the provisions of any federal or state statute nor shall it affect the right of any person to recover under the terms of any policy of insurance. (Stats. 1970, Ch. 1454, as amended by Stats. 1974, Ch. 1158.)

8658. In any case in which an emergency endangering the lives of inmates of a state, county, or city penal or correctional institution has occurred or is imminent, the person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may be necessary to avoid the danger, or, if that is not possible, may release them. Such person shall not be held liable, civilly or criminally, for acts performed pursuant to this section.

8659. Any physician or surgeon (whether licensed in this state or any other state), hospital, nurse, or dentist who renders services during any state of war emergency, a state of emergency, or a local emergency at the express or implied request of any responsible state or local official or agency shall have no liability for any injury sustained by any person by reason of such services, regardless of how or under what circumstances or by what cause such injuries are sustained; provided, however, that the immunity herein granted shall not apply in the event of a willful act or omission. (Stats. 1970, Ch. 1454, as amended by Stats. 1974, Ch. 1158.)

8660. No other state or its officers or employees rendering aid in this state pursuant to any interstate arrangement, agreement, or compact shall be liable on account of any act or omission in good faith on the part of such state or its officers or employees while so engaged, or on account of the maintenance or use of any equipment or supplies in connection with an emergency.

Article 18. Political Activity

8661. No organization established under the authority of this chapter shall participate in any form of political activity nor shall it be employed directly or indirectly for political purposes.

Article 19. Penalties and Severability

8665. Any person who violates any of the provisions of this chapter or who refuses or willfully neglects to obey any lawful order or regulation promulgated or issued as provided in this chapter, shall be guilty of a misdemeanor and, upon conviction thereof, shall be punishable by a fine of not to exceed five hundred dollars ($500) or by imprisonment for not to exceed six months or by both such fine and imprisonment.

8666. If any section, subdivision, subsection, sentence, clause, or phrase in this chapter, or the application thereof to any person or circumstances, is for any reason held invalid, the validity of the remainder of the chapter, or the application of such provision to other persons or circumstances, shall not be affected thereby. The Legislature hereby declares that it would have passed this chapter and each section, subdivision, subsection, sentence, clause, or phrase thereof, irrespective of the fact that one or more sections, subdivisions, subsections, sentences, clauses, or phrases, or the application thereof to any person or circumstance, be held invalid.

Article 20. Effect Upon Existing Matters

8668. (a) Any disaster council previously accredited, the State Civil Defense and Disaster Plan, the State Emergency Resources Management Plan, the State Fire Disaster Plan, the State Law Enforcement Mutual Aid Plan, all previously approved civil defense and disaster plans, all mutual aid agreements, and all other documents and agreements existing as of the effective date of this chapter, shall remain in full force and effect until revised, amended, or revoked in accordance with the provisions of this chapter.

(b) Nothing in this chapter shall be construed to diminish or remove any authority of any city, county, or city and county granted by Section 11 of Article XI of the California Constitution.

CHAPTER 1267

An act to add Section 955.1 to the Government Code, relating to claims against public entities, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 27, 1976. Filed with Secretary of State September 28, 1976.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1950, Alquist. Claims against public entities.

Existing law does not provide for nonliability on the part of public entities for damage resulting from actions taken or not taken by public entities or employees in response to an earthquake prediction.

This bill would so provide. The Governor would be permitted to warn the public of such a prediction and the state would not be liable for any injury resulting from a decision to issue or not issue such a warning. The bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 955.1 is added to the Government Code, to read:

955.1. (a) The science of earthquake prediction is developing rapidly and, although still largely in a research stage, such predictions are now being initiated and are certain to continue into the future. Administrative procedures exist within the Office of Emergency Services to advise the Governor on the validity of earthquake predictions. Numerous important actions can be taken by state and local governments and special districts to protect life and property in response to predictions and associated warnings. It is the intent of this legislation to insure that appropriate actions are taken in the public interest by government agencies without fear of consequent financial liabilities when acting in a responsible manner under such circumstances to assure public safety. This legislation is not intended to provide immunity for government officials and other government employees acting in a nondiscretionary capacity from liability for injuries arising out of ordinary negligence. It is also the intent of this legislation that actions taken by state and local agencies pursuant to the authorized dissemination of an earthquake prediction may be taken under conditions other than a declared state of emergency.

(b) The Governor may, at his discretion, warn the public as to the existence of an earthquake prediction determined to have scientific validity. The state and its agencies shall not be liable for any injury resulting from the decision to issue or not to issue a warning pursuant

to this subdivision.

(c) In addition, the state, its agencies, and its political subdivisions may, on the basis of a warning issued pursuant to subdivision (b), take, or fail or refuse to take, any action with relation to the warning issued which is otherwise authorized by law. In taking, or failing or refusing to take such action, the state, its agencies, and its political subdivisions shall be subject to the same immunities as apply to such action, or failure or refusal to take such action, when done upon any other valid basis.

SEC. 2. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order that appropriate actions might be taken by government officials to assure the public safety and welfare in dealing with earthquake predictions, it is necessary that this act take effect immediately.

C. Alquist-Priolo Special Studies Zones.

1. Alquist-Priolo Special Studies Zones Act.

Excerpts from California Public Resources Code

(Signed into law December, 1972; amended September 26, 1974, May 4, 1975 and September 28, 1975)

DIVISION 1. ADMINISTRATION
CHAPTER 2. DEPARTMENT OF CONSERVATION
Article 3. State Mining and Geology Board and the Division of Mines and Geology

660. There is in the department a State Mining and Geology Board consisting of nine members appointed by the Governor.

673. The board shall also serve as a policy and appeals board for the purposes of Chapter 7.5 (commencing with Section 2621) of Division 2.

DIVISION 2. GEOLOGY, MINES AND MINING
CHAPTER 7.5. SPECIAL STUDIES ZONES

2621. This chapter shall be known and may be cited as the Alquist-Priolo Special Studies Zones Act.

2621.5. It is the purpose of this chapter to provide for the adoption and administration of zoning laws, ordinances, rules, and regulations by cities and counties in implementation of the general plan that is in effect in any city or county. The Legislature declares that the provisions of this chapter are intended to provide policies and criteria to assist cities, counties, and state agencies in the exercise of their responsibility to provide for the public safety in hazardous fault zones.

This chapter is applicable to any project, as defined in Section 2621.6, upon issuance of the official special studies zones maps to affected local jurisdictions, but does not apply to any development or structure in existence prior to the effective date of the amendment of this section at the 1975–76 Regular Session of the Legislature.

2621.6. (a) As used in this chapter, "project" means

(1) Any new real estate development which contemplates the eventual construction of structures for human occupancy, subject to the Subdivision Map Act (commencing with Section 66410 of the Government Code).

(2) Any new real estate development for which a tentative tract map has not yet been approved.

(3) Any structure for human occupancy, other than a single-family wood frame dwelling not exceeding two stories.

(4) Any single-family wood frame dwelling which is built or located as part of a development of four or more such dwellings constructed by a single person, individual, partnership, corporation, or other organization. No geologic report shall be required with respect to such single-family wood frame dwelling if the dwelling is located within a new real estate development, as described in paragraph (1) or (2) of this subdivision, for which development a geologic report has been either approved or waived pursuant to Section 2623.

(b) For the purposes of this chapter, a mobilehome whose body width exceeds eight feet shall be considered to be a single-family wood frame dwelling not exceeding two stories.

2621.7. This chapter, except Section 2621.9, shall not apply to the conversion of an existing apartment complex into a condominium. This chapter shall apply to projects which are located within a delineated special studies zone.

2621.8. This chapter shall not apply to alterations or additions to any structure within a special studies zone the value of which does not exceed 50 percent of the value of the structure.

2621.9. A person who is acting as an agent for a seller of real property which is located within a delineated special studies zone, or the seller if he is acting without an agent, shall disclose to any prospective purchaser the fact that the property is located within a delineated special studies zone.

2622. In order to assist cities and counties in their planning, zoning, and building-regulation functions, the State Geologist shall delineate, by December 31, 1973, appropriately wide special studies zones to encompass all potentially and recently active traces of the San Andreas, Calaveras, Hayward, and San Jacinto Faults, and such other faults, or segments thereof, as he deems sufficiently active and well-defined as to constitute a potential hazard to structures from surface faulting or fault creep. Such special studies zones shall ordinarily be one-quarter mile or less in width, except in circumstances which may require the State Geologist to designate a wider zone.

Pursuant to this section, the State Geologist shall compile maps delineating the special studies zones and shall submit such maps to all affected cities, counties, and state agencies, not later than December 31, 1973, for review and comment. Concerned jurisdictions and agencies shall submit all such comments to the State Mining and Geology Board for review and consideration within 90 days. Within 90 days of such review, the State Geologist shall provide copies of the official maps to concerned state agencies and to each city or county having jurisdiction over lands lying within any such zone.

The State Geologist shall continually review new geologic and seismic data and shall revise the special studies zones or delineate additional special studies zones when warranted by new information. The State Geologist shall submit all revised maps and additional maps to all affected cities, counties, and state agencies for their review and comment. Concerned jurisdictions and agencies shall submit all such comments to the State Mining and Geology Board for review and consideration within 90 days. Within 90 days of such review, the State Geologist shall provide copies of the revised and additional official maps to concerned state agencies and to each city or county having jurisdiction over lands lying within any such zone.

2623. The approval of a project by a city or county shall be in accordance with policies and criteria established by the State Mining and Geology Board and the findings of the State Geologist. In the development of such policies and criteria, the State Mining and Geology Board shall seek the comment and advice of affected cities, counties, and state agencies. Cities and counties shall require, prior to the approval of a project, a geologic report defining and delineating any hazard of surface fault rupture. If the city or county finds that no undue hazard of this kind exists, the geologic report on such hazard may be waived, with approval of the State Geologist.

After a report has been approved or a waiver granted, subsequent geologic reports shall not be required, provided that new geologic data warranting further investigations is not recorded.

2624. Nothing in this chapter is intended to prevent cities and counties from establishing policies and criteria which are stricter than those established by this chapter or by the State Mining and Geology Board, nor from imposing and collecting fees in addition to those required under this chapter.

2625. (a) Each applicant for approval of a project may be charged a reasonable fee by the city or county having jurisdiction over the project.

(b) Such fees shall be set in an amount sufficient to meet, but not to exceed, the costs to the city or county of administering and complying with the provisions of this chapter.

(c) The geologic report required by Section 2623 shall be in sufficient detail to meet the criteria and policies established by the State Mining and Geology Board for individual parcels of land.

2630. In carrying out the provisions of this chapter, the State Geologist and the board shall be advised by the Geologic Hazards Technical Advisory Committee consisting of nine members nominated by the State Geologist and appointed by the board. Members of the committee shall be selected and appointed on the basis of their professional qualifications and training in seismology, structural geology, engineering geology, or related disciplines in science and engineering, and shall possess general knowledge of the problems relating to geologic seismic hazards and building safety. The members of the committee shall receive no compensation for their services, but shall be entitled to their actual and necessary expenses incurred in the performance of their duties.

2. Policies and Criteria of the State Mining and Geology Board.

(with reference to the
Alquist-Priolo Special Studies Zones Act
Chapter 7.5, Division 2, Public Resources Code,
State of California)

(Adopted November 23, 1973; revised July 1, 1974, and June 26, 1975)

The legislature has declared in the ALQUIST-PRIOLO SPECIAL STUDIES ZONES ACT that the State Geologist and the State Mining and Geology Board are charged under the Act with the responsibility of assisting the Cities, Counties, and State agencies in the exercise of their responsibility to provide for the public safety in hazardous fault zones. As designated by the Act, the policies and criteria set forth hereinafter are limited to hazards resulting from surface faulting or fault creep. This limitation does not imply that other geologic hazards are not important and that such other hazards should not be considered in the total evaluation of land safety.

Implementation of the ALQUIST-PRIOLO SPECIAL STUDIES ZONES ACT by affected Cities and Counties fulfills only a portion of the requirement for these Counties and Cities to prepare seismic safety and safety elements of their general plans, pursuant to Section 65302 (F) and 65302.1 of the Government Code. The special studies zones, together with these policies and criteria, should be incorporated into the local seismic safety and safety elements of the general plan.

The State Geologist has compiled and is in the process of compiling maps delineating special studies zones pursuant to Section 2622 of the Public Resources Code. The special studies zones designated on the maps are based on fault data of varied quality. It is expected that the maps will be revised as more complete geological information becomes available. Also, additional special studies zones may be delineated in the future. The Board has certain responsibilities regarding review and consideration of those maps prior to the time that they are finally determined. Cities, Counties and State agencies have certain opportunities under the Act to comment on the preliminary maps provided by the State Geologist and these Policies and Criteria. Certain procedures are suggested herein with regard to those responsibilities and comments.

Please note that the Act is not retroactive (Section 2621.5 of the Public Resources Code). It applies to every proposed *new* real estate development or structure for human occupancy that constitutes a "project" as defined under Section 2621.6 of the Public Resources Code.

Review of Preliminary Maps

The State Mining and Geology Board suggests that each reviewing governmental agency take the following steps in reviewing the preliminary maps submitted for their consideration:

1. All property owners within the preliminary special studies zones mapped by the State Geologist should be notified by the Cities and Counties of the inclusion of their lands within said preliminary special studies zones by publication or other means designed to inform said property owners. Such notification shall not of necessity require notification by service or by mail. This notification will permit affected property owners to present geologic evidence they might have relative to the preliminary maps.
2. Cities and Counties are encouraged to examine the preliminary maps delineating special studies zones and to make recommendations, accompanied by supporting data and discussions, to the State Mining and Geology Board for modification of said zones in accordance with the statute and within the time period specified therein.
3. For purposes of the Act, the State Mining and Geology Board regards faults which have had surface displacement within Holocene time (about the last 11,000 years) as active and hence as constituting a potential hazard. Upon submission of satisfactory geologic evidence that a fault shown within a special studies zone has not had surface displacement within Holocene time, and thus is not deemed active, the Mining and Geology Board may recommend to the State Geologist that the boundaries of the special studies zone be appropriately modified.

The definition of active fault is intended to represent minimum criteria only for all structures. Cities and Counties may wish to impose more restrictive definitions requiring a longer time period of demonstrated absence of displacements for critical structures such as high-rise buildings, hospitals, and schools.

Specific Criteria

The following specific and detailed criteria shall apply within special studies zones and shall be included in any planning program, ordinance, rules and regulations adopted by Cities and Counties pursuant to said SPECIAL STUDIES ZONES ACT:

A. No structure for human occupancy, public or private, shall be permitted to be placed across the trace of an active fault. Furthermore, the area within fifty (50) feet of an active fault shall be assumed to be underlain by active branches of that fault unless and until proven otherwise by an appropriate geologic investigation and submission of a report by a geologist registered in the State of California. This 50-foot standard is intended to represent minimum criteria only for all structures. It is

the opinion of the Board that certain essential or critical structures, such as high-rise buildings, hospitals, and schools should be subject to more restrictive criteria at the discretion of Cities and Counties.

B. Application for a development permit for any project (as defined in Section 2621.6) within a special studies zone shall be accompanied by a geologic report prepared by a geologist registered in the State of California, and directed to the problem of potential surface fault displacement through the project site, unless such report is waived pursuant to Section 2623.

C. One (1) copy of all such geologic reports shall be filed with the State Geologist by the public body having jurisdiction within thirty days following acceptance by the approving jurisdiction. The State Geologist shall place such reports on open file.

D. A geologist registered in the State of California, within or retained by each City or County, must evaluate the geologic reports required herein and advise the body having jurisdiction and authority.

E. Cities and Counties may establish policies and criteria which are more restrictive than those established herein. In particular, the Board believes that comprehensive geologic and engineering studies should be required for any "critical" or "essential" structure as previously defined whether or not it is located within a special studies zone.

F. In accordance with Section 2625 of the Public Resources Code, each applicant for approval of a project within a delineated special studies zone may be charged a reasonable fee by the City or County having jurisdiction over the project.

G. As used herein the following definitions apply:

1. A "project" includes any structure for human occupancy or new real estate development as defined under Section 2621.6 of the Public Resources Code.
2. A "structure for human occupancy" is one that is regularly, habitually or primarily occupied by humans; excluding therefrom freeways, roadways, bridges, railways, airport runways, and tunnels. The excluded transportation structures should be sited and designed with due consideration to the hazard of surface faulting. Mobile homes, whose body width exceed eight (8) feet, are considered as structures for human occupancy.
3. A "new real estate development" is defined as any new development of real property which contemplates the eventual construction of "structures for human occupancy."

D. Hospitals.

1. Senate Bill No. 519.

CHAPTER 1130

An act to add Division 12.5 (commencing with Section 15000) to the Health and Safety Code, relating to hospitals, and making an appropriation therefor.

[Approved by Governor November 21, 1972. Filed with Secretary of State November 21, 1972.]

LEGISLATIVE COUNSEL'S DIGEST

SB 519, Alquist. Hospital construction.

Requires the State Department of Public Health, through a contract with the Department of General Services, to (1) observe the construction of or addition to any hospital building or, if the work alters structural elements, the reconstruction or alteration of any hospital building, as it deems necessary for the protection of life and property; and (2) pass upon and approve or reject all plans for the construction or the alteration of any hospital building, independently reviewing the design and geological data to assure compliance with the requirements of the act. Requires that geological data be reviewed by an engineering geologist and structural design data be reviewed by a structural engineer.

Requires the governing board of each hospital or other hospital governing authority, before adopting any plans for such hospital building, to submit the plans to the State Department of Public Health for approval and to pay prescribed fees, specifies what must accompany the application for approval, and prescribes requirements for plans and specifications.

Creates a Hospital Building Account in the Architecture Public Building Fund, requires that all fees collected pursuant to the act be credited to such account, and continuously appropriates money in such account, without regard to fiscal years, for the use of the State Department of Public Health, subject to approval of the Department of Finance, in carrying out the provisions of the act.

Declares that no contract for the construction or alteration of any hospital building made or executed on or after the effective date of the act is valid, and prohibits payment of any money for work done under such a contract, or for any labor or materials furnished in constructing or altering any such building, unless prescribed requirements are satisfied.

Prescribes requirements re administration of the work of construction, inspection of hospital buildings and of the work of construction or alteration, and reports concerning the work of construction or alteration.

Authorizes the State Department of Public Health to call upon the Department of General Services to make a periodic review of hospital operations to assure that the hospital is adequately prepared to resist

damage caused by earthquake tremor and prescribes requirements re such review.

Authorizes the State Department of Public Health to make regulations to carry out the act.

Requires the Director of Public Health to appoint a Building Safety Board to advise and act as a board of appeals in all matters affecting seismic safety in the administration and enforcement of the act.

Declares intent of the Legislature to preempt from local jurisdictions the enforcement of building regulations adopted pursuant to this act, including plan checking, and intent of the Legislature that where local jurisdictions have more restrictive standards for enforcement of building regulations and construction supervision, such standards shall be enforced by the state.

Prescribes penalty for violations.

Defines "hospital building," "construction or alteration," "architect," "structural engineer," and "engineer geologist."

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares as follows:

(a) California is situated on the rim of the great Circum-Pacific seismic belt and it is inevitable that strong seismic disturbances along this belt will cause extensive property damage and endanger the lives of all people who enter or are near buildings which may collapse or be seriously damaged by such seismic disturbances.

(b) It is reasonable to expect that any building located anywhere within California will be subjected to the forces generated by a strong earthquake at least once during its life.

(c) Following the 1933 Long Beach earthquake, the Legislature enacted the so-called "Field Act" (Sections 15451 to 15466, inclusive, Education Code) as an urgency measure, which established reasonable minimum standards and procedures for the design and construction of new public school buildings. The durability during subsequent earthquakes of school buildings designed and constructed under the provisions of those statutes, when compared with the durability during the same earthquakes of other buildings not designed and constructed pursuant to the "Field Act," has repeatedly illustrated the prudence of such legislation.

(d) The San Fernando Valley earthquake of February 9, 1971, although moderate in terms of total energy release, resulted in such total collapse or damage as made many hospital buildings inoperable. Some of these damaged or destroyed hospital buildings were relatively new structures, designed and constructed to meet the standards as prescribed by most local jurisdictions throughout the State of California.

SEC. 2. It is the intent of the Legislature that hospitals, which house patients having less than the capacity of normally healthy

persons to protect themselves, and which must be completely functional to perform all necessary services to the public after a disaster, shall be designed and constructed to resist, insofar as practicable, the forces generated by earthquakes, gravity, and winds. In order to accomplish this purpose the Legislature intends to establish proper building standards for earthquake resistance based upon current knowledge, and intends that procedures for the design and construction of hospitals be subjected to independent review. It is further the intent of the Legislature that Division 12.5 (commencing with Section 15000) of the Health and Safety Code shall be administered by the State Department of Public Health, which shall contract for enforcement of such provisions with the Department of General Services which now successfully enforces the provisions of the "Field Act."

SEC. 3. Division 12.5 (commencing with Section 15000) is added to the Health and Safety Code, to read:

DIVISION 12.5. BUILDINGS USED BY THE PUBLIC

CHAPTER 1. HOSPITALS

15000. It is the intent of the Legislature that the Department of General Services shall analyze the structural systems and details, as set forth in the working drawings and specifications, and observe the construction of hospital projects and report the findings of such analysis to the state department. It is further the intent of the Legislature to preempt from local jurisdictions the enforcement of building regulations adopted pursuant to this chapter including the plan checking. It is further the intent of the Legislature that where local jurisdictions have more restrictive standards for the enforcement of building regulations and construction supervision, such standards shall be enforced by the state.

15001. "Hospital building," as used in this chapter, means and includes any building used, or designed to be used, for a hospital and shall include all of the following:

(a) All hospitals of a type required to be licensed pursuant to Chapter 2 (commencing with Section 1400) of Division 2 and facilities of a type required to be licensed pursuant to Chapter 1 (commencing with Section 7000) of Division 7 of the Welfare and Institutions Code.

(b) Institutions conducted, maintained, or operated by this state or any state department, authority, district, bureau, commission, or officer or by the Regents of the University of California, or by a board of supervisors of a county under the provisions of Chapter 2.5 (commencing with Section 1440) of Division 2, which, except for the exemption provided by Section 1415, would be encompassed by the terms of subdivision (a).

15002. "Construction or alteration," as used in this chapter,

includes any construction, reconstruction, or alteration of, or addition to, any hospital building.

15003. "Architect," as used in this chapter, means a person who is certified and holds a valid license under Chapter 3 (commencing with Section 5500) of Division 3 of the Business and Professions Code.

15004. "Structural engineer," as used in this chapter, means a person who is validly certified to use the title structural engineer under Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code.

15005. "Engineering geologist," as used in this chapter, means a person who is validly certified under Chapter 12.5 (commencing with Section 7800) of Division 3 of the Business and Professions Code.

15006. The state department, through its contract with the Department of General Services, shall observe the construction of, or addition to, any hospital building or, if the work alters structural elements, the reconstruction or alteration of any hospital building, as it deems necessary to comply with the provisions of this chapter for the protection of life and property.

15007. The state department, through its contract with the Department of General Services, shall pass upon and approve or reject all plans for the construction or the alteration of any hospital building, independently reviewing the design and geological data to assure compliance with requirements of this chapter. Geological data shall be reviewed by an engineering geologist and structural design data shall be reviewed by a structural engineer. The governing board of each hospital or other hospital governing authority, before adopting any plans for such hospital building, shall submit the plans to the state department for approval and shall pay the fees prescribed in this chapter.

15008. In each case, the application for approval of the plans shall be accompanied by the plans and full, complete, and accurate specifications, and structural design computations, and the specified fee, which shall comply with requirements prescribed by the state department.

15009. Plans submitted pursuant to this chapter for work which affects structural elements shall contain an assessment of the nature of the site and potential for earthquake damage, based upon geologic and engineering investigations by competent personnel of the causes of earthquake damage. One-story Type V construction of 4,000 square feet or less shall be exempt from the provisions of this section.

15010. The engineering investigation shall be correlated with the geologic evaluation made pursuant to Section 15009.

15011. The application shall be accompanied by a filing fee in an amount which the state department determines will cover the costs of administering this chapter. Such fee shall be based on a uniform percentage of the estimated construction cost, and shall not exceed 0.7 percent of the estimated construction cost.

The minimum fee in any case shall be one hundred dollars ($100). If the actual construction cost exceeds the estimated construction cost by more than 5 percent, a further fee shall be paid to the state department, based on the above schedule and computed on the amount by which the actual cost exceeds the amount of the estimated cost.

15012. All fees shall be paid into the State Treasury and credited to the Hospital Building Account, which is hereby created in the Architecture Public Building Fund, and are continuously appropriated without regard to fiscal years for the use of the state department, subject to approval of the Department of Finance, in carrying out the provisions of this chapter. Adjustments in the amounts of the fees, as determined by the state department and approved by the Department of Finance, shall be made within the limits set in Section 15011 in order to maintain a reasonable working balance in the account.

15013. All plans and specifications shall be prepared under the responsible charge of an architect or a structural engineer, or both. A structural engineer shall prepare the structural design and shall sign plans and specifications related thereto. Administration of the work of construction shall be under the responsible charge of such architect and structural engineer, except that where plans and specifications for alterations or repairs do not affect architectural or structural conditions, such plans and specifications may be prepared and work of construction may be administered by a professional engineer duly qualified to perform such services and holding a valid certificate under Chapter 7 (commencing with Section 6700) of Division 3 of the Business and Professions Code for performance of services in that branch of engineering in which said plans, specifications, and estimates and work of construction are applicable.

15014. Before letting any contract for any construction or alteration of any hospital building, the written approval of the plans as to safety of design and construction, by the state department, through its contract with the Department of General Services, shall be first had and obtained.

15015. No contract for the construction or alteration of any hospital building, made or executed on or after the effective date of this chapter by the governing board or authority of any hospital or other similar public board, body, or officer otherwise vested with authority to make or execute such a contract, is valid, and no money shall be paid for any work done under such a contract or for any labor or materials furnished in constructing or altering any such building, (1) unless the plans and specifications comply with the provisions of this chapter and the requirements prescribed by the state department, and (2) the approval thereof in writing has first been had and obtained from the state department, through its contract with the Department of General Services, and (3) the hospital building is to be accessible to,

and usable by, the physically handicapped, and (4) the plans and specifications comply with the fire and panic safety requirements of the State Fire Marshal.

15016. The state department, through its contract with the Department of General Services, shall make such inspection of the hospital buildings and of the work of construction or alteration as in its judgment is necessary or proper for the enforcement of this chapter and the protection of the safety of the public. The hospital governing board or authority shall provide for and require competent, adequate, and continuous inspection during construction or alteration by an inspector satisfactory to the architect or structural engineer, or both, and the state department. The inspector shall act under the direction of the architect or structural engineer, or both, and be responsible to the board or authority. Notwithstanding any other provision of this section, where alterations or repairs are to be conducted under the supervision of a professional engineer pursuant to Section 15013, the inspector need only be satisfactory to the state department and to the professional engineer, and the inspector shall act under the direction of the professional engineer. In approving any inspector, the state department shall consult with the Department of General Services.

15017. From time to time, as the work of construction or alteration progresses and whenever the Department of General Services requires, the architect or structural engineer, or both, in charge of construction or registered engineer in charge of other work, the inspector on the work, and the contractor shall each make to the Department of General Services a report, duly verified by him, upon a form prescribed by the state department, in consultation with the Department of General Services, showing, of his own personal knowledge, that the work during the period covered by the report has been performed and materials used and installed are in accordance with the approved plans and specifications, setting forth such detailed statements of fact as are required by the Department of General Services.

The term "personal knowledge," as used in this section and as applied to the architect or registered engineer, or both, means personal knowledge which is the result of such general administration of construction as is required and accepted of, and for, such persons in the construction of buildings. Such persons shall, however, use reasonable diligence to obtain the information required.

The term "personal knowledge," as applied to the inspector, means the actual personal knowledge of the inspector obtained by his personal, continuous observation of the work of construction at the construction site in all stages of progress.

15018. Upon written request to the state department by the governing board or authority of any hospital, the state department through contract with the Department of General Services shall make, or cause to be made, an examination and report on the

structural condition of any hospital building subject to the payment by the governing board or authority of the actual expenses incurred by the state department.

15019. The state department may call upon the Department of General Services to make a periodic review of hospital operation to assure that the hospital is adequately prepared to resist damage caused by earthquake tremor. The review shall include, but not be limited to, evaluations of the structural safety of elevators, standby equipment and emergency procedures, and procedures and facilities for storage of dangerous gases, liquids, and solids. The governing board or authority of the hospital shall reimburse the state department for actual expenses incurred in making such review. The state department shall contract with the Department of General Services for such services.

15020. The state department, with the advice of the Department of General Services, shall from time to time make such rules and regulations as it deems necessary, proper, or suitable to effectually carry out the provisions of this chapter.

15021. There is in the state department a Building Safety Board which shall advise and act as a board of appeals with regard to seismic structural safety of hospitals. The Director of Public Health, with the advice of the Department of General Services, shall appoint the members of the Building Safety Board, which shall advise and act as a board of appeals in all matters affecting seismic structural safety in the administration and enforcement of this chapter. The board shall consist of 11 members appointed by the Director of Public Health and six ex officio members who are: the Director of Public Health, the State Architect, the State Fire Marshal, the State Geologist, the Chief of the Bureau of Health Facilities Planning and Construction in the state department and the Chief Structural Engineer of the Schoolhouse Section of the Office of Architecture and Construction in the Department of General Services. Of the appointive members, two shall be structural engineers, two shall be architects, one shall be an engineering geologist, one shall be a soils engineer, one shall be a seismologist, one shall be a mechanical engineer, one shall be an electrical engineer, and one shall be a hospital administrator. The appointive members shall serve at the pleasure of the director. He may also appoint as many other ex officio members as he may desire. Ex officio members are not entitled to vote. Board members, qualified by close connection with hospital design and construction and highly knowledgeable in their respective fields with particular reference to seismic safety, shall be appointed from nominees recommended by the governing bodies of the Structural Engineers Association of California; the California Council, American Institute of Architects; the Earthquake Engineering Research Institute; the Association of Engineering Geologists; the Consulting Engineers Association of California; the California Hospital Association. Board members shall

be residents of California.

15022. The Building Safety Board shall convene upon request of the chairman thereof. He may convene a meeting of the board whenever it may be necessary, in his judgment, for the board to meet. The board shall adopt such rules of procedure as are necessary to enable it to perform its duties. The chairman of the board shall, in his discretion, or upon instructions from the board, designate subcommittees to study and report back to the board upon any technical subject or matter for which an independent review or further study is desired. Members of the board shall be reimbursed from the Hospital Building Account in the Architecture Public Building Fund for their reasonable actual expenses in attending meetings conducted to carry out the provisions of this chapter, but shall receive no compensation for their services.

15023. Any person who violates any provision of this chapter is guilty of a misdemeanor.

CHAPTER 177

An act to amend Section 15001 of, and to add Section 15001.5 to, the Health and Safety Code, relating to seismic structural safety requirements for hospital buildings, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor May 26, 1976. Filed with Secretary of State May 27, 1976.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1843, Cullen. Hospital buildings: seismic safety requirements.

Under existing law, seismic structural safety requirements are prescribed for hospital buildings. The term "hospital building" is defined, for such purposes, as including (with certain exceptions) all licensed health facilities, which include general acute care hospitals, acute psychiatric hospitals, skilled nursing facilities, intermediate care facilities, and special hospitals.

This bill would redefine the term "hospital building," for the purposes of such seismic structural safety provisions, to include only licensed health facilities and to exclude single-story, wood frame buildings used, or designed to be used, for skilled nursing facilities or intermediate care facilities, and any single-story, wood frame building in which only skilled nursing or intermediate care services are provided if such building is not physically attached to a building housing other patients of the health facility receiving higher levels of care. However, a structural engineer would be required to submit a declaration to the State Department of Health that the design and construction of new buildings so excluded comply with prescribed requirements.

The bill would take effect immediately as an urgency statute.

The people of the State of California do enact as follows:

SECTION 1. Section 15001 of the Health and Safety Code is amended to read:

15001. (a) "Hospital building," as used in this chapter, shall include any building not specified in subdivision (b) which is used, or designed to be used, for a health facility of a type required to be licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2.

(b) "Hospital building" shall not include any of the following:

(1) Any building in which only outpatient services are provided and which is not physically attached to a building in which inpatient services are provided

(2) Any building used, or designed to be used, for a skilled nursing

facility or intermediate care facility if such building is of single-story, wood frame construction.

(3) Any building of single-story, wood frame construction in which only skilled nursing or intermediate care services are provided if such building is not physically attached to a building housing other patients of the health facility receiving higher levels of care.

SEC. 2. Section 15001.5 is added to the Health and Safety Code, to read:

15001.5. New construction of buildings specified in paragraphs (2) and (3) of subdivision (b) of Section 15001 shall conform to the provisions of the latest edition of the Uniform Building Code of the International Conference of Building Officials. A structural engineer shall submit a declaration that, in his opinion and to the best of his knowledge, the design and construction of such buildings comply with such standards. The declaration of the structural engineer shall be transmitted to the state department and shall additionally include an assessment of the nature of the site and the potential for earthquake damage based upon engineering investigation by competent personnel.

For the purposes of Section 1265.8, the state department shall be deemed to have approved the construction of any building subject to the requirements of this section for which a declaration meeting such requirements has been received by the department.

The Legislature recognizes the relative safety of single-story, wood frame construction for use in housing patients requiring skilled nursing and intermediate care services and it is, therefore, the intent of the Legislature to provide for reasonable flexibility in seismic safety standards for such structures.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

In order to revise the term "hospital building" in the law relating to seismic safety requirements at the earliest opportunity, it is necessary that this act take immediate effect.

E. Schools and Building Codes.

1. Field Act.

The Field Act of 1933 is found in Sections 15451 through 15465 of the Education Code.

It provides for a procedure to be followed in the design and construction or alteration of public school buildings used for elementary, secondary or community college purposes for the protection of life and property. The State Supreme Court has held that the Act is broad and comprehensive and includes the whole field of construction regulations.

The principal provisions of the Act require that:

1. Plans be prepared by a qualified person who knows the principles of structural engineering.

2. Design be checked by an independent State agency and design errors or omissions be corrected on plans before a contract for construction is let.

3. Construction be continuously inspected by a qualified person in the employ of the school board who shall see that plans are complied with.

4. The responsible architect or structural engineer shall supervise the work and prepare plan changes as necessary to overcome unforeseen field conditions.

5. All parties concerned (architect, engineer, inspector, contractor) must file verified reports under penalty of perjury that approved plans were complied with in the construction.

A copy of the Field Act is attached for detailed information.

EXTRACT FROM THE EDUCATION CODE

Part 3 - Division 11 - Chapter 2 - Article 4

Article 4. Approval of Plans and Supervision of Construction

15451. The Department of General Services under the police power of the state shall supervise the design and construction of any school building or, if the estimated cost exceeds ten thousand dollars ($10,000), the reconstruction or alteration of or addition to any school building, to ensure that plans and specifications comply with the rules and regulations adopted pursuant to this article and building regulations published in the State Building Standards Code, and to ensure that the work of construction has been performed in accordance with the approved plans and specifications, for the protection of life and property. Nothing in this section shall be construed to allow a school district to perform work with its own forces in excess of the limitations set forth in Sections 15951 and 15957.

(Amended by Stats. 1935, Ch. 284; Stats. 1959, Ch. 54; Stats. 1965, Ch. 371; Stats. 1974, Ch. 362)

15452. "School Building" as used in this article (commencing at Section 15451) means and includes any building used, or designed to be used, for elementary or secondary schools or community college purposes and constructed, reconstructed, altered, or added to, by the state or by any city or city and county, or by any political subdivision, or by any school district of any kind within the state, or by any regional occupational center or program created by or authorized to act by an agreement under joint exercise of power, or by the United States government, or any agency thereof.

(Amended by Stats. 1935, Ch. 284; Stats. 1945, Ch. 1275; Stats. 1970, Ch. 102 and by Stats. 1972, Ch. 845)

15453. "Construction or alteration" as used in this article (commencing at Section 15451) includes any construction, reconstruction, or alteration of, or addition to, any school building.

(Amended by Stats. 1959, Ch. 2)

15454. The Department of General Services shall pass upon and approve or reject all plans for the construction or, if the estimated cost exceeds ten thousand dollars ($10,000), the alteration of any school building. To enable it to do so, the governing board of each school district and any other school authority before adopting any plans for such school building shall submit the plans to the Department of General Services for approval, and shall pay the fees prescribed in this article (commencing at Section 15451).

(Amended by Stats. 1959, Ch. 2; Stats. 1965, Ch. 371 and by Stats. 1967, Ch. 1392)

15455. Before letting any contract for any construction or alteration of any such school building, the written approval of the plans, as to safety of design and construction, by the Department of General Services, shall be first had and obtained.
(Stats. 1959, Ch. 2; Amended by Stats. 1965, Ch. 371; and by Stats. 1967, Ch. 1392)

15456. In each case the application for approval of the plans shall be accompanied by the plans and full, complete, and accurate specifications, and structural design computations, and estimates of cost, which shall comply in every respect with any and all requirements prescribed by the Department of General Services.
(Stats. 1959, Ch. 2; Amended by Stats. 1965, Ch. 371)

15457. The application shall be accompanied by a filing fee in amounts as determined by the Department of General Services based on the estimated cost, and such fee shall not exceed one-half of 1 percent of the estimated cost.

The minimum fee in any case shall be fifty dollars ($50). If the actual cost exceeds the estimated cost by more than 10 percent, a further fee shall be paid to the Department of General Services, based on the above schedule and computed on the amount by which the actual cost exceeds the amount of the estimated cost.
(Stats. 1959, Ch2; Amended by Stats. 1955, Ch. 643; Stats. 1961, Ch. 1767; Stats. 1965, Ch. 371; and by Stats. 1969, Ch. 1019)

15458. All fees shall be paid into the State Treasury and credited to the Division of Architecture Public Building Fund, which fund is continued in existence and is retitled the Architecture Public Building Fund, and are available without regard to fiscal years for the use of the Department of General Services, subject to approval of the Department of Finance, in carrying out the provisions of this article (commencing at Section 15451) and Article 2.5 (commencing with Section 15371).

Adjustments in the amounts of the fees, as determined by the Department of General Services and approved by the Department of Finance, will be made within the limits set in Sections 15373 and 15457 of this article in order to maintain a reasonable working balance in the fund.
(Amended by Stats. 1955, Ch. 643; Stats. 1961, Ch. 462; Stats. 1965, Ch. 371; Stats. 1965, Ch. 885; and by Stats. 1972, Ch. 1394)

15459. All plans, specifications, and estimates shall be prepared by a certified architect holding a valid license under Chapter 3 of Division 3 of the Business and Professions Code or by a structural engineer holding a valid certificate to use the title structural engineer under Chapter 7 of Division 3 of the Business and Professions Code, and the supervision of the work of construction shall be under the responsible charge of such an architect or structural engineer, except that where plans, specifications, and estimates for alterations or repairs do not involve architectural or structural changes said plans, specifications, and estimates may be prepared and work of construction may be supervised by a professional engineer duly qualified to perform such services and holding a valid certificate under Chapter 7 of Division 3 of the Business and Professions Code for performance of services in that branch of engineering in which said plans, specifications, and estimates and work of construction are applicable.

(Amended by Stats. 1959, Ch. 2)

15459.1. As of January 1, 1976, any person employed to inspect the construction, reconstruction or alteration of any school building shall be a person who is registered as a construction inspector in the division in which he is to be used, as defined by Section 9101 of the Business and Professions Code. This section shall not apply to any architect, structural engineer, civil engineer, land surveyor, mechanical engineer, engineering geologist, or electrical engineer, who holds a valid certificate of registration in this state, insofar as he is practicing within the provisions of the law under which he is registered.

(Added by Stats. 1973, Ch. 1145)

15460. No contract for the construction or alteration of any school building, made or executed by the governing board of any school district or other public board, body, or officer otherwise vested with authority to make or execute such a contract, is valid, and no public money shall be paid for any work done under such a contract or for any labor or materials furnished in constructing or altering any such building, unless the plans, specifications, and estimates comply in every particular with the provisions of this article (commencing at Section 15451) and the requirements prescribed by the Department of General Services and unless the approval thereof in writing has first been had and obtained from the Department of General Services.

(Stats. 1959, Ch. 2; Stats. 1965, Ch. 371)

15461. From time to time, as the work of construction or alteration progresses and whenever the Department of General Services requires, the certified architect or structural engineer in charge of construction or registered engineer in charge of other work, the inspector on the work, and the contractor shall each make to the Department of General Services a report, duly verified by him, upon a form prescribed by the Department of General Services, showing, of his own personal knowledge, that the work during the period covered by the report has been performed and materials used and installed, in every particular, in accordance with the approved plans and specifications, setting forth such detailed statements of fact as are required by the Department of General Services.

(Amended by Stats. 1959, Ch. 2; Stats. 1965, Ch. 371)

15462. The Department of General Services may from time to time make such rules and regulations as it deems necessary, proper, or suitable effectually to carry out the provisions of this article (commencing at Section 15451).

(Stats. 1959, Ch 2; Amended by Stats. 1965, Ch. 371)

15463. The State Department of General Services shall make such inspection of the school buildings and of the work of construction or alteration as in its judgment is necessary or proper for the enforcement of this article (commencing at Section 15451) and the protection of the safety of the pupils, the teachers, and the public. The school district, city, city and county, or the political subdivision within the jurisdiction of which any school building is constructed or altered shall provide for and require competent, adequate, and continuous inspection during construction or alteration by an inspector satisfactory to the architect or structural engineer and the Department of General Services. The inspector shall act under the direction of the architect or structural engineer as the board may direct and be responsible to the governing board.

(Stats. 1959, Ch. 2; Amended by Stats. 1965, Ch. 371)

15464. Any person who violates any of the provisions of this article (commencing at Section 15451) or makes any false statement in any verified report or affidavit required pursuant to this article (commencing at Section 15451), is guilty of a felony.

(Stats. 1959, Ch. 2)

15465. Upon written request by the governing board of any school district or upon written request by at least ten percent of the parents having children enrolled as pupils in any school district as certified to by the county superintendent of schools, the Department of General Services shall make an examination and report on the structural condition of any public school building of the district, subject to the payment by the governing board of the actual expenses incurred by the Department of General Services. Payment of the expenses may be waived by the Department of General Services on recommendation of the State Superintendent of Public Instruction when it appears to him that the school district in which the public school building is located cannot afford to pay them.

(Stats. 1959, Ch 2; Amended by Stats. 1965, Ch. 371)

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2. Garrison Act.

The Garrison Act of 1939 is found as subsequently amended in Sections 15503 through 15518 of the Education Code.

As originally enacted it provided for the corrective steps a school board must take if an examination by an architect or structural engineer found a school building to be unsafe. It also provided that if after taking the required steps (generally related to holding elections to provide funds for repairs) the electorate did not authorize the board to sell bonds or increase taxes and if the district had no other funds available to make repairs the board members were not to be held personally liable for continued use of the unsafe building. No time limit was established.

In 1963 the provisions which specifically absolved the board members of personal liability were repealed.

In 1967 the Act was amended to:

(1) require examination prior to January 1, 1970 of all school buildings used for school purposes which were not constructed under the Field Act.

(2) provide immunity to personal liability for school board members upon initiating action to examine such buildings.

In 1968 the Act was further amended to require abandonment of unsafe school buildings by June 30, 1975.

A copy of the Garrison Act is attached for detailed information.

EXTRACT FROM EDUCATION CODE

Part 3 - Division 11 - Chapter 2 - Article 5

Building Examinations; Required Actions of Governing Board Upon Report of Unsafe Condition

15503. The governing board of any school district which has in use for school purposes any school buildings which were not constructed under approved plans and the supervision and inspection requirements of Article 4 (commencing with Section 15451) of this chapter shall have such buildings examined pursuant to this section and shall have completed on or before January 1, 1970, the examination, reporting and estimate requirements of this section and Section 15512.

Whenever an examination of the structural condition of any school building of a school district has been made by the Department of General Services, or by any licensed structural engineer or licensed architect for the governing board of the school district, or under the authorization of law, and a report of the examination, including the findings and recommendations of the agency or person making the examination, has been made to the governing board of the district, and the report shows that the building is unsafe for use, the governing board of the district shall immediately have prepared an estimate of the cost necessary to make such repairs to the building or buildings as are necessary, or, if necessary, to reconstruct or replace the building so that the building when repaired or reconstructed, or any building erected to replace it, shall meet such standards of structural safety as are established in accordance with law. The estimate shall be based on current costs and may include other costs to reflect modern educational needs. Also an estimate of the cost of replacement based on the standards established by the State Allocation Board for area per pupil and cost per square foot, shall be made and reported.

The report required by this section shall include a statement that each of the buildings examined is safe or unsafe for school use. For the purpose of this statement the sole consideration shall be protection of life and the prevention of personal injury at a level of safety equivalent to that established by Article 4 (commencing with Section 15451) of this chapter and the rules and regulations adopted thereunder, disregarding, insofar as possible, such building damage not jeopardizing life

which would be expected from one disturbance of nature of the intensity used for design purposes in said rules and regulations.

The governing board, utilizing the information acquired from the examination and report developed pursuant to this section, shall establish a system of priorities for the repair, reconstruction, or replacement of unsafe school buildings. (Stats. 1959, Ch. 2; Amended by Stats. 1965, Ch. 371; Stats. 1967, Ch. 214; Stats. 1968, Ch. 1174.)

Certain School Buildings Situated on Geological Fault Deemed to be Structurally Unsafe

15503.1. Whenever an examination of the geological characteristics of the site on which any public school building constructed prior to 1957 is situated has been made at the request of the governing board by a licensed geologist prior to the effective date of the act which enacted this section, and the report shows that the school building is situated on the trace of an active geological fault along which it can reasonably be expected that surface rupture will occur within the life of such building, such building shall be deemed structurally unsafe for school use. Such building shall be subject to replacement at another location in accordance with the procedure provided for repair, reconstruction, or replacement in Section 15503 as though it had not been constructed in conformance with Article 4 (commencing with Section 15451) of this chapter.

This section shall remain in effect only until July 1, 1976, and as of that date is repealed.
(Added by Stats. 1973, Ch. 756; Amended by Stats. 1974, Ch. 1219.)

School Building; Definition

15503.2. "School building" as used in this article excludes any building which is used for community college district administrative buildings located on a site separate from the community college campuses of the district, and into which pupils are not required to enter. (Amended by Stats. 1970, Ch. 102)

Exclusions From School Building Definition

15503.5. "School building" as used in this article excludes any building which is used exclusively for warehouse, storage, garage, or districtwide administrative office purposes, into which pupils are not required to enter, and buildings utilized by adult schools or community colleges for off-campus, voluntary adult education courses.

If any building so excluded was not constructed in accordance with Article 4 (commencing with Section 15451) of this chapter and was not repaired, reconstructed, or replaced in accordance with this article, there shall be posted in a conspicuous place on such building a public notice stating that such building does not meet the structural standards imposed by law for earthquake safety. (Amended by Stats. 1970, Ch. 919; Stats. 1971, Ch. 866.)

Securing Authorization for Expenditure of Funds for Repair

15504. After securing the estimates, the governing board of the district shall, if the district has sufficient funds to its credit to permit the repairs, reconstruction, or replacement and such funds do not represent the proceeds of a bond issue previously authorized by the electorate of the district for other purposes, immediately proceed in such manner as is authorized by law to secure the necessary authorization for the expenditure of the funds. If authorization to expend the funds is not required by law, the board shall within six months from the receipt of the report of the examination of the building or buildings initiate action for the repair, reconstruction, or replacement of the building or buildings. (Stats. 1959, Ch. 2; Amended by Stats. 1967, Ch. 214.)

Procedure Where Funds Are Insufficient

15505. If the district does not have sufficient funds available to permit the governing board of the district to proceed with the repair, reconstruction, or replacement of the building or buildings, the governing board shall within 12 months after receiving the report of the examination of the building or buildings, call an election. At such election there shall be submitted to the qualified electors of the district either proposition (a) or (b), or both propositions (a) and (b), as determined by the governing board of the district, as follows:

(a) (1) Authorization of bonds of the district in an amount sufficient, as shown by the estimate, to provide funds for the repair, or reconstruction, of the building or buildings, in accordance with the governing board's plan; or

(2) Authorization of bonds of the district in an amount sufficient as shown by the estimate obtained by the district to construct new school facilities on the site of one or more of the unfit building or buildings, or on other sites, in accordance with the governing board's plan.

(b) Authorization of the increase of the maximum tax rate of the district for such length of time as will permit raising sufficient funds by district taxation for the repair,

reconstruction, or replacement of the building in accordance with the governing board's plan.

In connection with the submission of either proposition (a) or (b), or both propositions (a) and (b), the governing board of the district may submit to the qualified electors of the district a proposition for the abandonment of the building and the use of tents or other temporary structures for school purposes in lieu of the building abandoned.

Neither of the propositions under (a) and (b) shall be required to make provision for financing of the entire repair, reconstruction or replacement program of the district, but shall at least provide funds for commencement of such repair, reconstruction or replacement, consistent with the governing board's plan. (Amended by Stats. 1970, Ch. 780.)

Authorization for Expenditure of Funds Submitted at Election

15506. Where authorization of the qualified electors for the expenditure of the funds is required under any law of this State, the proposition to authorize the expenditure shall be submitted at the election. (Stats. 1959, Ch. 2.)

Resolution and Notice Calling Election

15507. The resolution ordering and the notice calling the election shall specify the building or buildings initially proposed to be repaired, reconstructed, or replaced, and those proposed to be repaired, reconstructed, or replaced pursuant to the governing board's plan. (Stats. 1959, Ch. 2; Amended by Stats. 1963, Ch. 629; Stats. 1967, Ch. 214)

Conduct of Election

15508. The election shall be called, held and conducted in the manner provided in Chapter 6 of Division 4 of this code. Each elector shall be entitled to vote upon each of the propositions. (Stats. 1959, Ch. 2; Amended by Stats. 1963, Ch. 629)

Issuance and Sale of Bonds, and Use of Proceeds

15509. If, at the election, the requisite number of voters cast their ballots in favor of the issuance of bonds, the bonds shall be issued and sold in the manner provided by law for the issuance and sale of bonds of the district, and the proceeds used for the purpose or purposes specified in the resolution or

notice calling the election. In such event, the results of the voting upon the proposition calling for an increase in the maximum tax rate of the district submitted at the election shall be disregarded. (Stats. 1959, Ch. 2; Amended by Stats. 1967, Ch. 214)

Increase in District Tax Rate and Use of Proceeds

15510. If, at the election, issuance of bonds of the district is not authorized, and if, on the proposition of increasing the tax rate of the district the number of votes cast in the affirmative is sufficient to authorize an increase in the tax rate of the district, the increase shall be authorized, and the governing board shall proceed to increase the rate and to use the proceeds of the increased tax solely for the purpose or purposes specified in the resolution or notice calling the election. (Stats. 1959, Ch. 2; Amended by Stats. 1967, Ch. 214.)

Issuance of Bonds or Increased Tax Rate; Use of Temporary Structures

15511. If at the election, no proposition which is required to be submitted to the qualified electors is approved and authorized, the governing board of the district shall, in accordance with the same or a modified plan, submit either the proposition to authorize the issuance of bonds, or the proposition to increase the tax rate, or both, no later than five years following the last submission of either or both of these propositions to the qualified electors of the district. The result of the voting on the proposition to authorize the use of tents or other temporary structures shall be considered by the governing board as an advisory vote, and the tents or other temporary structures may be used for school purposes to the extent that such use is deemed necessary by the governing board. (Stats. 1959, Ch. 2; Amended by Stats. 1967, Ch. 214; Stats. 1968, Ch. 646; Stats. 1968, Ch. 1174.)

Summary of Examination Reports to be Filed

15512. The governing board of each school district required to act pursuant to Section 15503 shall, within 12 months after receiving the report of the examination of the building or buildings, place on file with the Bureau of School Planning within the Department of Education a summary of all reports of examinations and estimates relating to school buildings which have not been repaired, reconstructed or replaced in accordance with law, including a summary of previous elections held and actions taken concerning this matter, if any, and a statement of intentions to

repair, reconstruct or replace such buildings which shall constitute the governing board's plan. The plan shall include the approximate date it is contemplated that such actions to repair, reconstruct or replace each such building will occur. (Amended by Stats. 1970, Ch. 780.)

Report to Legislature

15513. The Bureau of School Planning within the Department of Education shall summarize and report to the Legislature every two years, commencing with the 1968 Regular Session, the data placed on file with the bureau pursuant to Section 15512. (Added by Stats. 1967, Ch. 214.)

Liability of Governing Board Members

15514. Except as provided in Section 15515, nothing in this article shall be construed as relieving any member of the governing board of a school district of any liability for injury to persons or damage to property imposed by law. (Added by Stats. 1967, Ch. 214.)

Limitation on Liability of Governing Board

15515. No member of the governing board of a school district shall be held personally liable for injury to persons or damage to property resulting from the fact that a school building was not constructed under the requirements of Article 4 (commencing with Section 15451) of this chapter, if such governing board complies with the provisions of this article. Such limit on liability shall commence when such governing board initiates action to comply with the provisions of Section 15503.

A licensed structural engineer or licensed architect employed by a governing board to examine any school building under this article shall not be held personally liable for injury to persons or damage to property as a result of the structural inadequacy and failure of a building, provided he has exercised normal professional diligence in carrying out his functions under Article 4 (commencing with Section 15451) of this chapter and the provisions of this article. (Added by Stats. 1967, Ch. 214; Amended by Stats. 1968, Ch. 1174.)

Use of Unsafe Buildings Not Repaired or Reconstructed

15516. No school building examined and found to be unsafe for school use pursuant to Section 15503 and not repaired or reconstructed in accordance with the provisions of this article shall be used as a school building for elementary and secondary school or community college purposes after June 30, 1975, unless the governing board of the school district has requested and obtained from the

State Allocation Board authority for use of such building for a specific period beyond such date. Prior to requesting such authority, the governing board shall adopt a resolution declaring the board's intention to utilize the building as a school building after June 30, 1975, pending its repair, reconstruction, or replacement. The State Allocation Board shall not authorize any school district to use such a building beyond June 30, 1975, unless it has first determined that the school district has already proceeded with a plan of repair, reconstruction or replacement in a timely manner and a contract has been let for, and work commenced on, the repair, reconstruction or replacement of such buildings. In no event shall the State Allocation Board authorize the use of such unsafe facilities for a period extending beyond the completion of the replacement facilities or beyond June 30, 1977, whichever occurs first.
(Amended by Stats. 1970, Ch. 102; and Stats. 1974, Ch. 190.)

Application for Funds for Repair, Reconstruction or Replacement of Buildings

15516.5. Notwithstanding any other provision of this article or Article 9 (commencing with Section 19700.51) of Chapter 10 of Division 14, whenever a school district does not have funds available to repair, reconstruct, or replace the school buildings referred to in this article, or Section 19700.605, the school district shall apply for such funds as may be necessary to accomplish such repair, reconstruction, or replacement pursuant to the provisions of Article 9. The school district shall also accept such funds as are disbursed to the district pursuant to Article 9, whether or not the funds constitute the maximum amount applied for, and shall repay such funds in accordance with the provisions of Article 9. In cases in which funds derived from a tax increase levied pursuant to Section 15518 are utilized to match amounts disbursed to a school district under an apportionment made pursuant to Article 9 (commencing with Section 19700.51) of Chapter 10 of Division 14, such disbursement and repayment may be made without the necessity of a vote of the electorate of the district as prescribed in any provision of Chapter 10 (commencing with Section 19551) of Division 14.
(Added by Stats. 1971, Ch. 1496; Amended by Stats. 1974, Ch. 1172.)

15517. Expired July 1, 1973.

Authority of Governing Board to Take Corrective Measures Relating to Earthquake Safety; Duration of Section

15518. The governing board of a school district may undertake corrective measures relating to earthquake safety recommended to the governing board pursuant to Section 15503 in connection with any school building under the jurisdiction of the governing board without compliance with the procedures otherwise prescribed by Section 15505.

The maximum rate of tax of any school district for the fiscal years 1974-75 to 1976-77, inclusive, is hereby increased by such amount as will produce the amount necessary to have any school buildings examined as required by Section 15503 and to effect the corrective structural repairs, reconstruction or replacement relating to earthquake safety recommended pursuant to Section 15503, as shown by the budget of the district for such school year as finally adopted by the governing board of the district, less any unencumbered balances remaining at the end of the preceding school year derived from revenue from the increase in the rate of tax provided by this section. The funds provided by such increase in the tax rate may be used to provide for the housing of pupils temporarily displaced by the repair, reconstruction, or replacement of school buildings required in order to meet earthquake safety standards.

The increase provided by this section and Section 15517 shall not exceed a total increase of ten cents ($0.10) for each one hundred dollars ($100) of the assessed valuation of property within the district in each fiscal year, unless additional funds are specifically required by the district to match state funds provided pursuant to Article 9 (commencing with Section 19700.51) of Chapter 10, Division 14. If such additional funds are required by the district, the maximum increase in tax rate provided by this section may be increase by not to exceed an additional ($0.10) for each one hundred dollars ($100) of assessed valuation of property within the district in each fiscal year such additional funds are required pursuant to Article 9, prior to and including the 1973-74 fiscal year. Such additional tax money may be levied in the 1974-75 fiscal year only if the State Allocation Board has first approved an application of the district pursuant to Article 9. After the 1974-75 fiscal year, any district which has levied the entire twenty-cent ($0.20) amount permitted by this section in the preceding fiscal year and has deposited in the State School Building Fund of the district, the proceeds derived therefrom as matching funds in an application or applications under Article 9 may levy the same twenty-cent ($0.20) tax or so much thereof as is necessary for matching funds for an application or applications under Article 9 in any succeeding fiscal year, including, but not beyond, the 1976-77 fiscal year.

Any balance derived from the revenue of the increase in tax rate levied for matching purposes of Article 9, as herein provided, which is not expended under an application or applications approved pursuant to Article 9 at the completion of the construction project and approval of final costs thereof by the State Allocation Board shall be applied as a repayment of any apportionment heretofore or hereafter outstanding against the district under the provisions of Article 9.

This section shall remain operative only until July 1, 1978, and as of such date is repealed. This section shall remain in effect until such date regardless of the repeal or expiration of Section 15517.

Notwithstanding the provisions of this section, the governing board shall comply with the provisions of Section 15505 whenever such compliance is necessary to continue the program of corrective structural repairs, reconstruction, or replacement required pursuant to the provisions of this article.
(Amended by Stats. 1969, Ch. 333; Stats. 1969, Ch. 1523; Stats. 1970, Ch. 840; Stats. 1971, Ch. 1496; Stats. 1974, Ch. 190; Stats. 1974, Ch. 1172.)

15518.5. Whenever the geological characteristics of a school site in which any public school building is located is subject to Section 15503.1, the governing board of the school district may undertake corrective measures relating to earthquake safety recommended to the governing board pursuant to Section 15503 in connection with any school building under the jurisdiction of the governing board without compliance with the procedures otherwise prescribed by Section 15505.

The maximum rate of tax of any such school district for the fiscal years 1974-75 and 1975-76 is hereby increased by such amount as will produce the amount necessary to have any school buildings, subject to Section 15503.1 examined as required by Section 15503 and to effect the corrective structural replacement relating to earthquake safety recommended pursuant to Sections 15503 and 15503.1, as shown by the budget of the district for such school year as finally adopted by the governing board of the district, less any unencumbered balances remaining at the end of the preceding school year derived from revenue from the increase in the rate of tax provided by this section. The funds provided by such increase in the tax rate may be used to provide for the housing of pupils temporarily displaced by the replacement of school buildings required in order to meet earthquake safety standards.

The increase provided by this section shall not exceed a total increase of ten cents ($0.10) for each one hundred dollars ($100) of the assessed valuation of property within the district in each fiscal year.

If at the end of any school year, there remains an unencumbered balance derived from the revenue of the increase in tax rate hereby provided, such balance may be accumulated until the date specified in this section for the termination of its effect and shall be used exclusive for expenditures of the school district for purposes of the section.

The increase in tax rate provided by this section shall not be deemed to be in addition to the increase provided by Section 15518. During any period in which both this section and Section 15518 are in effect and operative, this section shall be deemed alternative to Section 15518 in any instance in which both are applicable to any particular factual situation.

This section shall remain in effect until July 1, 1976, and as of that date is repealed. This section shall remain in effect until such date regardless of the repeal or expiration of Sections 15517 and 15518.

Notwithstanding the provisions of this section, the governing board shall comply with the provisions of Section 15505 whenever such compliance is necessary to continue the program of corrective structural repairs, reconstruction, or replacement required pursuant to the provisions of this article.
(Added by Stats. 1974, Ch. 1219.)

15519. Any revenue derived from an increase in the rate of tax provided by Section 15518 prior to July 1, 1975, and which is unexpended on that date, may be used after July 1, 1975, by the governing board of a school district to complete the corrective structural repair, reconstruction, or replacement of any school building subject to Section 15503 which had not been completed on that date.
(Added by Stats. 1974, Ch. 206.)

3. Riley Act.

The Riley Act is found in Sections 19100-19170 of the Health and Safety Code and provides that all buildings (excluding certain farm type buildings and dwellings as listed in Section 19100) shall be constructed to resist stresses produced by lateral forces as provided in Article 23, Part VI, Title 24 CAC.

Prior to 1965 the Riley Act itself prescribed lateral design wind forces and earthquake forces of 2% to 3% of the total vertical design load. In 1965 the Act was amended to refer instead to Title 24 for lateral forces, as noted above. Title 24 regulations which were in effect at that time are essentially the same as the 1961 UBC provisions. Since a specific reference in the statutes to administrative regulations must be interpreted to mean those administrative regulations which were in effect at the time of enactment, later revisions to Title 24 have no effect insofar as the Riley Act is concerned.

Prior to 1965 the Riley Act (Section 19151) also provided for allowable working stresses to be assumed in resisting the prescribed lateral forces. In 1965 this part was repealed. In effect then, the current Riley Act prescribes how lateral forces shall be computed but does not prescribe allowable stresses.

A copy of the Riley Act is attached for further information.

HEALTH AND SAFETY CODE - PART 3

Chapter 2. Earthquake Protection

Article 1. Scope and Application

19100. This chapter does not apply to any of the following buildings:

(a) Any building not intended primarily for occupancy by human beings and located entirely outside the limits of a city or city and county.

(b) Any building designed and constructed for use exclusively as a dwelling by not more than two families and located entirely outside the limits of a city or city and county.

(c) Any building designed and constructed primarily for use in housing poultry, livestock, hay, grain, or farm machinery and supplies, even though persons may work in, or may otherwise be present in, such building from time to time.

(d) Any building under construction on and prior to May 26, 1933.

(e) Any building in an unincorporated area and used for human habitation and of wood frame construction and not more than two stories in height, in which the span between bearing walls does not exceed twenty-four feet (24'), no room in which contains an area of more than one thousand square feet (1,000 sq. ft.), and which is located in a labor camp as defined in Section 2410 of the Labor Code.
(Amended by Stats. 1955, Ch. 1491, and by Stats. 1968, Ch.367.)

19101. Any city, city and county, or county may establish by ordinance construction standards higher than those established by this chapter.

Article 2. Enforcement

19120. The building department of every city and city and county shall enforce this chapter within the city or city and county.

"Building department" means the department, bureau, or officer charged with the enforcement of laws or ordinances regulating the erection, construction, or alteration of buildings.

19121. The department, officer, or officers of a county who are charged with the enforcement of ordinances or laws regulating the erection, construction, or alteration of buildings shall enforce this chapter within the county but outside the territorial limits of any city.

19122. Any city or county may, by ordinance, designate any department or officer, other than a department or officer mentioned in this chapter, to enforce all or any part of this chapter.

19123. In any city where there is no department or officer charged with or designated for the enforcement of this chapter, the appropriate department, officer or officers of the county in which such city is located shall enforce this chapter.

In any county where there is no department or officer charged with or designated for the enforcement of this chapter, this chapter shall be enforced by the county engineer, if there is a county engineer, and if not, then by the county surveyor. (Added by Stats. 1941, Ch. 301.)

19124. The Division of Codes and Standards of the Department of Housing and Community Development may enforce any provision of this chapter which it finds is being violated in a building hereafter constructed, after it has given the enforcement agency written notice of the violation and the enforcement agency has failed to secure correction of the violation within the following 10 days. In such cases where the division processes applications for building permits the fees prescribed in this chapter shall be payable to the division. (added by Stats. 1955, Ch. 1775; amended by Stats. 1969, Ch. 1394; Stats. 1974, Ch. 859.)

Article 2a. Building Permits

(Article 2a added by Stats. 1941, Ch. 1097)

19130. No person shall construct a building subject to this chapter unless he has obtained a written permit for that purpose from the appropriate enforcement agency. (Added by Stats. 1941, Ch. 301.)

19131. Any person desiring a permit shall file an application therefor with the appropriate enforcement agency, which application shall contain:

(a) The name and address of the applicant.

(b) A detailed written statement of the work to be done. (added by Stats. 1941, Ch. 301.)

19132. The applicant shall file with his application:

(a) A complete set of the plans of the work proposed.

(b) A set of specifications describing the materials to be used in the work.

(c) The fee prescribed for filing an application for a building permit. (Added by Stats. 1941, Ch. 301; amended by Stats. 1945, Ch. 1147.)

19132.3. The governing body of any city or county may adopt an ordinance prescribing fees for filing applications as will pay the expenses of the enforcement agency incurred in issuing permits pursuant to this chapter. Where the Department of Housing and Community Development is the enforcement agency, the Commission of Housing and Community Development may establish a schedule of fees to pay the cost of administration and enforcement of this chapter. All rules and regulations promulgated by the commission under the authority of this part shall be promulgated pursuant to Chapter 4.5 (commencing with Section 11371) of Part 1 of Division 3 of Title 2 of the Government Code. (Added by Stats. 1945, Ch. 1147; amended by Stats. 1969, Ch. 1394.)

19132.5. Where work for which a permit is required by this chapter is started or proceeded with prior to the obtaining of such permit, the fees prescribed in Section 19132.3 shall be doubled. The payment of such double fee does not relieve any person from fully complying with the requirements of this chapter in the execution of the work. (Added by Stats. 1945, Ch. 1147.)

19132.7. The enforcement agency shall determine the cost of the work to be done for which the applicant desires a permit, and shall be guided by approved estimating practices. The enforcement agency shall keep a permanent account of all fees received under this chapter, the names of the persons upon whose account the same were paid, the date and the amount thereof, and the location of the building or premises to which they relate. All fees received shall be paid into the treasury of the city or county. (Added by Stats. 1945, Ch. 1147.)

19132.9. The United States, the State of California, school or other districts, counties and cities shall not be required to pay a fee for filing an application for a building permit pursuant to this chapter. (Added by Stats. 1945, Ch. 1147; amended by Stats. 1973, Ch. 692.)

19133. The enforcement agency shall examine the application, plans, and specifications filed with it by an applicant, and if it appears that the work to be done will not result in a violation of this chapter, shall approve them and issue a permit to the applicant. (Added by Stats. 1941, Ch. 301.)

19134. The enforcement agency may approve changes in any application, plans, or specifications previously approved by it. (Added by Stats. 1941, Ch. 301.)

19135. The enforcement agency may revoke any permit if the permittee refuses, fails, or neglects to comply with any provision of this chapter, or if it finds that any false statement or misrepresentation was made in the application, plans, or specifications filed by the permittee. (Added by Stats. 1941, Ch. 301.)

19136. The work authorized by a permit shall be performed only in accordance with the application, plans, and specifications filed by the permittee. (Added by Stats. 1941, Ch. 301.)

19137. The issuance of a permit does not constitute approval of any violation of any provision of this chapter. (Added by Stats. 1941, Ch. 301.)

19138. In any case where a building subject to this chapter is also subject to any permit provisions of the rules and regulations promulgated pursuant to the provision of the State Housing Law, it shall not be necessary to make duplicate filings of plans and specifications hereunder, to include in the application a detailed statement of the work to be done, nor shall it be necessary to pay a fee for filing an application for a building permit under this chapter if a fee is prescribed by local ordinance for a permit under the State Housing Law. In such cases, the application hereunder may contain a general statement of the work to be done, with a specific reference to the application, plans, and specifications filed under the State Housing Law. (Added by Stats. 1941, Ch. 301; amended by Stats. 1945, Ch. 1147; amended by Stats. 1961, Ch. 1844.)

Article 3. Design and Construction

19150. Every building or structure and every portion thereof shall be designed and constructed to resist stresses produced by lateral forces as provided in Part 2 (commencing with Section B100), Title 24, California Administrative Code. In areas where the Division of Codes and Standards of the Department of Housing and Community Development is the enforcement agency, plumbing and electrical equipment and installations shall be subject to the rules and regulations adopted pursuant to Sections 17921 and 17922 of this code. (Amended by Stats. 1941, Ch. 1065; Stats. 1953, Ch. 1766; Stats. 1965, Ch. 1039; Stats. 1969, Ch. 1394; Stats. 1974, Ch. 859.)

19151. Repealed by Stats. 1965, Ch. 1039.

Article 4, Violations

19170. Any person who violates, or causes or permits another person to violate, any provision of this chapter is guilty of a misdemeanor. (Amended by Stats. 1941, Ch. 301.)

4. Title 21.

Title 21 is promulgated by the Department of General Services under authority vested by Section 15462 of the Education Code, which is part of the Field Act. Group 1 of Subchapter 1 in Chapter 1 includes a detailed description of operational regulations. Group 3 includes building regulations together with inspection and testing requirements pertaining to workmanship and materials of construction.

Title 21 is best known by the design profession for its regulations governing public school building construction and the term "Title 21" is quite often used to mean school building regulations. It is organized as follows:

Chapter 1 - Department of General Services

- Subchapter 1: Office of Architecture and Construction
  - Group 1: Structural Safety Section (Operational regulations)
  - Group 2: OAC Access to Handicapped Unit (Operational regulations)
  - Group 3: Structural Safety Section (Building regulations)

Chapter 2 - Department of Public Works

- Subchapter 1: Division of Bay Toll Crossings
- Subchapter 2: Division of Highways
- Subchapter 3: California Toll Bridge Authority (Repealed)
- Subchapter 4: California Highway Commission

Since the statutes now provide that all building regulations shall be published in Title 24 and that those shall supersede all others, the building regulations appearing in Title 21 are a reproduction of those in Title 24 using the numbering system of Title 24, and appear in Title 21 only for convenience of the user.

"Title 21" has an interesting historical background in which a few of the professionals and contractors whose firms are still active played leading roles.

Following the Santa Barbara earthquake of 1925 the State Chamber of Commerce, acting under pressures resulting from a sharp increase in earthquake insurance premiums, a requirement for such insurance by the State Corporation Commissioner for bond issues on certain types of buildings, and an evident need for public safety, directed its attention towards writing a building code for earthquake safety. The State Chamber in 1928 requested the cooperation of the AIA, ASCE, AGC, PCBOC and others in providing the necessary technical expertise. The code recommended by a committee of representatives from such organizations was accepted by the State Chamber of Commerce and published as a "Building Code for California" in 1939.

While this committee work was being done the Long Beach earthquake of March 10, 1933 struck and the Field Act was enacted effective April 10, 1933. The Act required the Division of Architecture of the State Department of Public Works to adopt regulations governing the design and construction of public school buildings to resist earthquakes. Such regulations known as "Appendix A, Temporary Regulation No. 5", were adopted effective April 10, 1933. It is notable that within 30 days from the time an earthquake occurred, a law was enacted and a building code was promulgated. Such immediate action was made possible through the work previously done by the committee for the State Chamber of Commerce. Although the State Chamber's Code was not published until six years later, the work of the Chamber's technical committee was adopted as "Appendix A" in 1933.

Subsequently, the regulations became a part of Title 21, CAC.

Title 24 is the State Code of building regulations promulgated in accordance with the Building Standards Law which is found in Sections 18900 through 18917 of the Health and Safety Code.

Title 24 is a codification, in one place, of all state agency building regulations, edited to eliminate conflict, duplication and overlap and renumbered to fit a single code format.

Title 24 is divided into seven parts as follows:

Part 1 State Building Standards Commission

Part 2 Basic Building Regulations

Part 3 Basic Electrical Regulations

Part 4 Basic Mechanical Regulations

Part 5 Basic Plumbing Regulations

Part 6 Special Building Regulations

Part 7 Elevator Safety Regulations

Part 6, Special Building Regulations, is divided into several divisions entitled T3, T8, T19, T21; etc. These divisions correspond with agency Titles (T19 - State Fire Marshal, T21 - Public Schools, etc.) and will include building regulations which are either not published in the referenced model codes or, if in the model codes, do not adequately cover the work under the jurisdiction of the agency. The section numbers used in the various divisions correspond with the numbers used for the same subject matter in the model codes except that each such number is preceded by T3-, T19-, T21-, etc.

Title 24 is at this time under study for extensive revisions which would replace the bulk of Parts 3, 4 and 5 with simple statements adopting model codes by reference, together with modifications which are applicable to all occupancies and all agencies.

6. Uniform Building Code.

The Uniform Building Code (UBC) is a model code published in several volumes and includes enforcement procedures, requirements pertaining to various occupancies, fire safety, structural safety, appliances, housing, mechanical, plumbing, material evaluations, etc. Its standards are intended to cover most design and construction conditions which prevail over a geographical area covering several states. The UBC becomes effective within a jurisdiction when adopted as an ordinance by cities or counties or as a regulation by the State. Such jurisdictions usually make modifications which are deemed necessary to fit jurisdictional conditions.

The Uniform Building Code (UBC) was first published in 1927 by the Pacific Coast Building Officials Conference and is now revised and published every third year by the International Conference of Building Officials whose membership comprises local building officials, professional members, manufacturers, and industry organizations. In addition to the triennial publication of UBC, the ICOBO annually publishes supplements which can also be readily adopted by local ordinance or state regulation.

The ICOBO also maintains a Research Committee which reviews and makes recommendations as to the acceptance of new materials and assemblies based upon test data submitted by applicants. Research recommendation cards for each such material or assembly are published for the guidance of building officials.

Inasmuch as the UBC is widely used at local levels by the design profession, the Department of General Services and the Structural Engineers Association of California sponsored legislation in 1970 to enable the various state code writing agencies to adopt the requirements of UBC by reference without the need to reprint such requirements in detail in Title 24, CAC.

A. Dalehite v. United States
346 US 15 (1953)

In 1947, as part of the foreign aid program, the United States government was involved in the production of fertilizer for export. The steamships Grandcamp and High Flyer were docked in Texas City, Texas each laden with over 1,000 tons of fertilizer which contained ammonium nitrate. In addition to fertilizer, the Grandcamp carried a large amount of explosives and the High Flyer carried 2,000 tons of sulfur. Early on April 15, 1947 a fire started in the hold of the Grandcamp, causing an explosion, killing all on board and igniting the High Flyer, which within a short time exploded too. A large part of the city was leveled. Many people died. Suit was brought against the government under the Federal Tort Claims Act.

The case alleged that the government was negligent in adopting a general fertilizer export plan, in manufacturing the fertilizer, and in supervising the loading of the ship. There were 8,500 plaintiffs who brought claims totaling more than $200 million.

In holding the government not liable, the Court decided that the activities of the government fell within the discretionary immunity. It stated that the discretionary immunity

> " . . . includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgement and decision, there is discretion."

The Court stated that the governmental decisions which plaintiffs complained of were made "at a planning rather than operational level."

A dissenting opinion stated that where negligence occurs in carrying out and implementing as exercise of discretion, such negligence should not be immunized. This viewpoint has been recognized many times in subsequent years.

B. Johnson v. State of California
69 C2d 782, 73 Cal. Rptr. 240, 447 P2d 352 (1968)

A parole officer for the California Youth Authority placed a 16-year old boy in the foster home of Mr. and Mrs. Johnson. The officer failed to notify the foster parents that the boy had "homocidal tendencies and a background of violence and cruelty towards both animals and humans." Five days later the boy assaulted and injured Mrs. Johnson.

Mrs. Johnson sued the State for negligence. The State defended in part by claiming that the decision not to warn the Johnsons of the boy's dangerous tendencies was immune as "discretionary."

The Court rejected a literal interpretation of "discretionary" stating that,

> "It would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some discretion in the manner of its performance, even if it only involved the driving of a nail."

The Court stated that it was difficult to distinguish between the "immune discretionary decision and the unprotected ministerial act . . ." The line should be drawn between planning and operational levels of decisionmaking.

The decision to parole the youth was immune but, after it was decided that the youth was to be placed with a particular family, the decision as to what information should be divulged was not immune. The Court stated that,

> " . . . although a basic policy decision . . . may be discretionary . . . subsequent ministerial actions in the implementation of the basic decision must still face case-by-case adjudication on the question of negligence."

The Johnson opinion is supportive of the Federal idea that the office of the decisionmaker may influence the "discretionary" nature of his decision. It also notes that in order to qualify for the "discretionary" immunity, the government must show that the decisionmaker actually took into account the relevant risks and benefits in reaching his decision.

C. Baldwin v. State of California
6 C3d 424, 99 Cal Rptr. 145 (1972)

A Mr. Baldwin was driving his pickup truck north on Hoffman Blvd. and stopped in the fast lane to make a left-hand turn onto Central Avenue. While he was waiting for oncoming traffic to clear, he was rear-ended and thrown into a head-on collision. He suffered serious personal injuries. He sued the State for maintaining a dangerous condition of public property because there was no separate left-turn lane. Baldwin was able to show the State knew that (1) the intersection, having been the site of many collisions, was very hazardous and (2) the traffic volume in the intervening 25 years since the intersection had been constructed had increased greatly.

The State defended the case on the basis of the design immunity which immunizes against liability for injuries caused by the design of an improvement to public property if:

1) the legislative body of the public entity or some other body or employee exercising discretionary authority approved the design in advance; and

2) there is substantial evidence supporting the reasonableness of the design decision.

The Court held that even if the original design decision is protected by the design immunity, subsequent changed conditions demonstrating a substantial danger in the design feature may render the design immunity inapplicable. The Court stated that,

"Having approved the plan or design, the public entity may not, ostrich-like, hide its head in the blueprints, blithely ignoring the actual operation of the plan. Once the entity has notice that the plan or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard."

D. Cameron v. State of California
7 C3d 318, 102 Cal. Rptr. 305 (1972)

Plaintiffs, Miss. Cameron and Mr. Tickles, both minors, were passengers in a car driven on Highway 9 in Santa Cruz County. As it entered an S-curve south of Waterman's gap, the car went out of control, skidded over 100 feet, and slammed into a hillside. Plaintiffs both received personal injuries,

Plainiffs sued the State for negligence, claiming that the road was incorrectly banked and in a dangerous condition of which the State should have given warning.

The State defended the suit on the basis of the design immunity. There was no showing, however, that the Santa Cruz County Board of Supervisors, in approving the design of the S-curve, had ever considered its banking.

The Court held that the design immunity will be applicable only if the particular design feature alleged to have caused the injury to plaintiff was actually considered in some reasonably explicit way in approving the design. The Court secondly held that even where the State is immune from liability for injuries caused by dangerous conditions of its property because of design immunity, the State may nevertheless be liable for its negligent failure to warn of the dangerous condition.

E. Morris v. Marin County (California)
18 C3d 901, 559 P2d 606, 136 Cal. Rptr. 251 (1977)

Morris, a construction worker, was injured and became a permanent paraplegic as a result of a fall while working on a construction project in Marin County. His employer did not have Workman's Compensation Insurance.

Morris sued Marin County, claiming that it should be liable for failure to comply with Labor Code §3800 which states that if a County requires a building permit prior to construction, the County "shall require" that each permit applicant carry Workman's Compensation Insurance. Morris alleged that the responsibility to require Workman's Compensation Insurance was a mandatory duty on the County under Government Code §815.6, which provides that:

> "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge its duty."

One defense was that the County should not be liable because the law provides specific immunities for injuries resulting from issuance of permits or from failure to enforce a law.

The Court disagreed. It stated that these immunities do not protect against liability for failure to perform a mandatory duty which the County could not, in its discretion, ignore. Thus, because the County was required to withhold (had no discretion to grant) the permit absent Workman's Compensation Insurance, the mandatory duty rule overrode the immunities for permit issuance and failure to enforce the law.

F. Connelly v. State of California
3 CA3d 744, 84 Cal. Rptr. 257 (1970)

Mr. Connelly was the owner of several marinas in the Sacramento River which were damaged because of unusually heavy rains and high waters in December of 1964. Connelly alleged that a forecast for the Sacramento River released to the public by the State Department of Water Resources had been flawed by a negligent breakdown in the collection of information. On December 22, 1964 he was informed that the maximum height of the river would be 24 feet. Connelly adjusted his docks to rise to 26 feet but the river rose to 29 feet and remained at that height for 2 weeks. Connelly alleged that he personally telephoned a Department of Water Resources office to secure the forecast and identified himself as a businessman who had a particular economic interest in the forecast. He sued the State of California for his damages.

The Court held that Connelly's suit was proper.

1) The State argued that it was not reasonable for Connelly to depend on the accuracy of the weather forecast because it is common knowledge that weather predictions are not statements of fact. While it acknowledged that this was true, the Court stated that Connelly was not alleging negligence because the forecast was wrong but because it was negligently prepared.

2) The State argued that its acts were immunized from liability by the discretionary immunity. Relying on Johnson v. State of California, the Court stated that:

> "The determination to issue flood forecasts is a policy-making function, a discretionary activity within the scope of governmental immunity, while gathering, evaluation and disseminating flood forecast information are administrative and ministerial activities outside the scope of governmental immunity. Consequently the question whether these unprotected acts were performed negligently must be determined from the facts of the case."

3) The State claimed that it was not liable because of the immunity for negligent misrepresentations provided by Goverment Code §818.8. The Court, again relying on Johnson noted that the misrepresentation immunity only applies to "interferences with financial or commercial interest." It stated that Connelly's loss was not the result of a "commercial transaction between him and the State, nor from the State's interference with his commercial transactions."

G. Cardenas v. Turlock Irrigation District
267 CA2d 352, 73 Cal Rptr. 69

The Cardenas family, with their two small boys ages 6 and 8, lived a block and a half from a branch of a canal maintained by the Turlock Irrigation District. The canal branch, which passed through a residential area of Modesto, represented 9 miles of the 250 miles of the District's canals, all of which were unfenced. The District knew that children of all ages swam regularly in the canal even though "no swimming" and "no trespassing" signs were posted by the District. The Cardenas boys had been warned repeatedly by their parents about the canals. However, early one evening during a period of unsupervised play, the Cardenas boys wandered to the canal and lost their lives by drowning.

The parents brought a wrongful death suit against the Distict, alleging the negligent failure of the District to fence the canal. In finding the District had no liability, the Court relied in part on Government Code §835.4 which states that a public entity will not be liable for injury caused by dangerous condition of its property if the public entity behaved reasonably in either creating the condition or in protecting against the risk of injury posed by the condition. Under §835.4, reasonableness is determined in part by:

> " . . . weighing the probability and gravity of potential injury to persons exposed to the risk of injury against the practicability and cost of taking alternative action that would not create the risk of injury or of protecting against the risk of injury."2

The Appellate Court endorsed the application of §835.4, stating,

> " . . . after considering such factors as the cost and practicability of fencing or undergrounding respondent's (the District's) canals respondent's ability to assume such costs, the public necessity involved in respondent's function of transporting irrigation water, the extent of the danger of injury to others, and the effectiveness of fencing to keep children out of the respondent's canals, the trial judge found that respondent's failure to fence the canal or to take other protective measures to protect small children was reasonable under all of the circumstances. We cannot hold that the trial judge was wrong as a matter of law."

H. Winmar v. City of Marysville*
(unreported trial court decision --
included for illustrative purposes only)

In the Marysville fire of July 24, 1974 Arthur Winmar received third-degree burns over 30% of bhis body, some fourth-degree burns involving muscle tissue and bone structure, and some cosmetic injuries to his chest that required extensive plastic surgery. Mr. Winmar was a tenant in an apartment building with two unenclosed stairwells. The fire had broken out during his sleep, travelled up the unenclosed stairwells, and cut off his avenues of escape. There was no fire extinguisher in the building, no fire alarm system, and the fire hose located on the 3rd. floor of the apartment building had burst when the water was turned on. The City of Marysville Fire Department had inspected the building on a more or less regular basis, at least annually, for 20 years prior to the subject fire and was well aware of the hazards that prevented Mr. Winmar from escaping.

The trial court gave judgment in favor of Mr. Winmar in the sum of several hundred thousand dollars based upon the City of Marysville's failure to perform a mandatory duty and its failure to warn the owners, occupants and managers of the building.

The Court found that the City of Marysville had adopted the 1971 Uniform Fire Code and the 1970 Uniform Building Code, including Appendix I, which made the building code applicable to existing buildings. These codes had requirements concerning stairwell enclosures, self-closing doors, fire walls, fire escapes and the like. The building code gave the city authority after due notice to declare substandard structures a nuisance and order them vacated.

The Court, in holding for liability, rested its decision in part upon the case of Morris v. Marin County, holding that there would be no liability for the city if it failed to inspect or negligently inspected the apartment, but that liability existed because once the city had undertaken to inspect and knew of the substandard conditions, it had a duty to enforce the building code.

The Court also held that the city had a duty to warn. This duty would not have arisen if the city had not become involved by inspecting the property. However, once the city inspected and had knowledge of the potential risk to victims, the Court held that the city was responsible for giving warning.

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*Provided by the trial attorney who defended the city.

I. Jordan v. City of Long Beach (California)
17 CA3d 878, 95 Cal. Rptr. 246 (1971)

On December 15, 1968 Lessie V. Jordan, after alighting from an automobile driven by her daughter, stepped in a hole in the paving and tripped over a protruding pipe. In her fall she sustained personal injuries. The hole in the paving and the protruding water pipe which caused the fall were located on private property immediately adjacent to city-owned property.

Jordan sued the City of Long Beach for maintaining a dangerous condition to public property. The Court held that while a public entity cannot be held liable for dangerous conditions of "adjacent property," the public entity's own property may be considered dangerous if "a condition on the adjacent property exposes those using the public property to a substantial risk of injury."

The Court determined that Jordan should be allowed to sue the City of Long Beach. The Court stated that the test for determining liability was whether the condition of private property

> " . . . created a substantial risk of harm to persons generally who would use the public property with due care in a foreseeable manner."

J. Adams v. State
555 P2d 235 (1976) -- Alaska

In April of 1969 State fire marshalls inspected the Gold Rush Hotel and found several violations including a faulty fire alarm system, exposed wood framing, and storage of building materials which created a fire hazard. One inspector wired his supervisor that the building was "an extreme life hazard in that it fails to meet standards of the State Fire Code." and asked the supervisor to come to the location as soon as possible. No action was taken by the State even after the hotel manager reminded the inspector in May of 1969 that he was supposed to receive a formal letter detailing corrective measures. In January of 1970 a fire raged through the Gold Rush Hotel, injuring several who managed to escape and killing five who were trapped. State statutes and regulations imposed obligations to conduct inspection and likewie an obligation to "order the dangerous conditions . . . removed or remedied in such manner as may be specified by the State Fire Marshall." Moreover, the regulations required the posting of a notice that the unsafe building should not be entered.

The court held the discretionary immunity inapplicable, saying that:

"In this case, the discretionary act could be described as the decision to inspect the [hotel]; the negligent performance of that inspection would then be an operational or ministerial act, and thus not immune."

The State defended by saying that it had no "affirmative duty" (no legal relationship requiring it to prevent injury) to the occupants of the hotel. The Alaska Supreme Court rejected this by relying on the "undertaking doctrine" which provides that even where no affirmative duty exists, if the government undertakes to render aid or rescue persons from peril and thereby increases their risk of harm or causes them to rely on the government and forego their own self-protective efforts, this, if the cause of injury, can result in liability.

K. Campbell v. City of Bellevue (Washington)
85 Wash.2d 1, 530 P2d 234 (1975)

A landowner's property was adjacent to a creek in which he had installed considerable outdoor and underwater lighting and wiring. On one occasion those attempting to extract a dead raccoon from the creek received an electrical shock. The City made an inspection after which a red tag was affixed to the front door of the landowner's residence which stated that "wiring running through creek is unsafe and constitutes a threat to life. This situation will have to be corrected immediatly or the service will be disconnected." However, no action was taken to sever or otherwise disconnect the outdoor wiring and no corrective measures were specified on the red tag. Five months later Eric Campbell, a next door neighbor, was playing near the creek and slipped in. He received a paralyzing shock. His mother, in attempting to rescue him, received a similar electric shock, fell into the stream and perished. The City's building code required that a building official shall "immediately sever" any unlawful electrical installation and, if the owner refuses to do so himself, "shall disconnect dangerous electrical facilities."

The Washington Supreme Court imposed liability. According to the Court, the key facts were that the inspector had actual knowledge of the extreme danger and violated the code in not taking steps to eliminate it. The City defended by saying that the City's building code gave the City a duty to the general public and not to the specific individuals who were injured. The Court stated that the requirements of the code were "not only designed for the protection of the general public but more particularly for the benefit of those persons or class of persons residing within the ambit of the danger involved, a category into which the plaintiff and his neighbors really fall." The Court noted that the City's code had dictated remedial action and that there had been a negligent failure to take appropriate action respecting known and serious dangers. The City argued that a provision of the code in question was intended to preclude liability. The Court rejected this contention but suggested by implication that an appropriate provision in a city code can be effective in preventing liability.

L. State v. Abbott
498 P2d 712 (1972) -- Alaska

While driving with her 13-year old daughter south along the Seward Highway, Mrs. Vogt lost control of her car on a slick curve. The car skidded across the center line and crashed into an Army National Guard truck which was part of a convoy. The daughter struck the windshield and received severe personal injuries, including brain damage. Suit was brought against the State of Alaska for negligence in its winter-time maintenance of the curve.

The State defended the case in part by claiming that the discretionary immunity covered its maintenance activites. The Court rejected the "semantic" definition of discretionary, a definition that would find "discretion" whenever a public decisionmaker has some raenge of legal choice. Instead, the Court adopted the rule that general policy level planning-type activities are discretionary whereas operational activities are not.

The Court determined that the original decision to maintain the State Highway through the winter by salting, sanding and plowing was discretionary and therefore immune. But "how" the decision should be carried out in terms of men and machinery is made at an operational level.

M. Brown v. McPherson's Inc.
86 Wash.2d 293, 545 P2d 13 (1975) -- Washington

The plaintiffs were local residents in the Stevens Pass area who suffered loss of life and/or property because of an avalanche. Dr. LaChapelle, a University of Washington avalanche expert, had warned the real estate division of the State Department of Motor Vehicles of the possibility of an avalanche in the Stevens Pass area. A represenative of the State agency had promised to convey this warning to the local residents. Relying upon this promise, Dr. LaChapelle refrained from taking direct action to give the local residents an appropriate warning. Not only did the State representative fail to comply with his promise, but in communications with a local developer (Mr. McPherson) he specifically indicated that there was no avalanche danger.

The State resisted the suit in part, claiming that it had no duty (affirmative duty) to those who were injured. The Washington Supreme Court imposed liability and found an affirmative duty on the basis of the undertaking theory. Dr. LaChapelle declined to warn the injured persons only because the State agent had promised that he would provide this warning. The court held that since Dr. LaChapelle had reasonably relied upon the agent's promise, this would "create a duty to warn . . . which the State assumed but did not perform."

Secondly, the State not only failed to comply with its promise but in undertaking to communicate with the developer, McPherson, it negligently understated the true danger, thereby persuading McPherson to refrain from taking action that he might otherwise have taken to protect the local residents. This, the Court held, was negligence in performance of the undertaking and increased the risk of harm to local residents, for which the State could be held liable.

N. Halvorson v. Dahl
574 P2d 1190 (1978) -- Washington

Suit was brought by the widow of a man who died in a fire in a Seattle hotel in May, 1976. Defendent Dahl owned the hotel. The City of Seattle was also named as a defendent based upon its alleged failure to enforce the building, housing and safety codes which allegedly resulted in the fire. It was alleged that the City had been aware of code violations in the hotel for at least 6 years prior to the fire. The City had embarked upon programs of enforcement of building, housing and safety codes on several occasions but had never followed through to force owners of the hotel to bring the structure into compliance.

In ruling that the plaintiff was entitled to sue, the Court discussed the "public duty" rule. It stated that:

> "The traditional rule is that municipal ordinances impose a duty upon municipal officials which is owed to the public as a whole, so that a duty enforceable in tort is not owed to any particular individual."

The Court found that the Halvorson claim fit within an exception to the tradtional rule as follows:

> "Liability can be founded upon a municipal code if that code by its terms evidences a clear intent to identify and protect a particular and circumscribed class of persons."

The Court considered that the Seattle housing code was such a statute.